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Enchiridion Legum:

A DISCOURSE

CONCERNING

The Beginnings, Nature, Difference, Progress and Use,

OF

LAWS in GENERAL;

And in Particular,

OF THE

Common & Municipal LAWS of ENGLAND.

LONDON,

Printed by **Elizabeth Flesher, John Streater,** and **Henry Twyford,** Assigns of **Richard Atkins & Edw. Atkins,** Esquires.

And are to be sold by *G.S. H.T. J.P. W.P. J.B. T.B. R.P. C.W. T.D. W.J. C.H. J.L. J.A. J.W.* & *J.P.*

M DC LXX III.

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Enchi-

Enchiridion Legum.

CHAP. I.

The definition, etymologie, diviſion, perfection, and imperfection of Laws: What is required to the making of them, and of their neceſſity.

MEaning to treat firſt of Laws in general, and next of the Common or Municipal Laws of this Kingdom; I conceive it cannot be unprofitable for an Introduction unto this intendment, to ſet down the definition of a Law: whereof *Juſtinian* hath delivered three, derived out of *Demoſthenes*, *Chryſippus*, and *Papinian*.

One is, that a Law is ſaid to be that, whereunto men ought to yield obedience, as in other reſpects, ſo eſpecially in this: becauſe it is an inven- 1.

tion of the Gods, a decree of Wiſe men, a correction of offences committed, either wittingly or ignorantly, a Covenant of the whole Commonwealth with one accord, after the direction whereof every Citizen ought to order
2. his life. The other is, that the Law is ſaid to be a Soveraign of all things, both *Divine* and *Humane*: That is, a Commander, a Guide, and a Square both of good and bad, enjoyning that which is fit, and forbidding the contrary. The one of theſe, is rather a deſcription, than a definition; and it deſcribeth rather the Natural, than the Poſitive Law: And the other is fitting rather to an Orator, than a Lawyer. We may therefore let them
3. paſs, and proceed to the third; which ſetteth down the Law, to be a general determination of Wiſe men, a Comptroller of Faults either eſcaped through ignorance, or committed upon wilfulneſs: And it is a general agreement of the Commonwealth. *Jaſon* obſerveth, that the Law is a general Commandment in three reſpects: either becauſe it is founded upon a general Authority; or becauſe

it

it belongeth to, and bindeth all; or elſe becauſe it is intended general for the profit of all. *Cicero* defineth the 4.
Law to be a certain reaſon flowing from the Divine mind, which doth perſwade that which is right, and prohibit the contrary. And *Plato* ſaith, that 5.
the Law obtaineth a name like to the name of the mind. But whilſt the Law is defined by the Divine mind, it ſeemeth (as one ſaith) to be defined by that which is more remote and general, than ſubject to common capacities. Yet are theſe definitions in ſome ſort true, being rather referred to the eternal Law, than to the poſitive and humane Laws, as ſhall be ſhortly ſhewed in his place. In the mean time, for that theſe (as the former) are, as was ſaid before, rather deſcriptions than perfect definitions; to come more near to the purpoſe: It may be ſaid, that humane Law is an 6.
Order and Ordinance including the Rule and Reaſon of Governing, and giving to every man, that which is his due; directing to the end of publique good, determining puniſhment to the Tranſgreſſors, and reward to the Obe-

7. dient. Therefore to conclude; humane Laws are nothing elſe but the ordinances and agreement of Wiſe men, concluded by publick Authority for the peace and profit of the greater part of the people living together in ſociety. It is ſaid [for the greater part] becauſe no humane poſitive Law is ſo generally good unto all, but that it is hurtful unto ſome, by accident if not of it ſelf.

The derivation of the word *Lex*, which we call Law.

If any do deſire to know from whence this word *Lex* (which in Engliſh we call Law) is derived: Some will ſay with *Iſidorus*, that it hath his etymologie, *à legendo*; becauſe after the Law was written, it was wont to be read unto the people. But this is not ſo certain, in that the reading of the Law by way of promulgation was but accidentary, and no eſſential part of the Law; although ſome have endeavoured to prove, that a Law could not be perfectly eſtabliſhed until it were promulgated by way of Proclamation.

1.

2. Others will derive the word *Lex*, *à ligando*; for as much as Divines hold, that men are tyed in *foro conſcientiæ*, to the

the obſervation of the Laws, as well as they are bound under penalty to obſerve the ſame: Yet *Cicero* concurreth with the firſt derivation, (but with a farther-fetch'd reaſon than the former) *quod Lex idem ſit, quod legendi, hoc eſt eligendi regula*; the reaſon is, *nam regula dirigendo, docet eligere.* It may yet well enough agree unto both, for one ſaith, *Habet Lex quod ſit Regula, & quod ſit obligatoria præceptio.* Howſoever theſe derivations of the word *Lex*, do ſtand falſe or true, it makes not much matter, ſo we leave them as more Grammatical and Conjectural, than certain and infallible.

A double ſignification of this word Law.

The word *Lex*, which in Engliſh we call Law, hath in our language a double ſignification, or is taken two ways; for it is taken both for that which the Latines term *Lex*, and for that which they call *Juris prudentia*; the one being the Art of the other: For *Lex* is the rule, and meaſure of things to be done, and to be left undone; but *Juris prudentia*, is the knowledge and method of that rule: as Juſtice is the Execution of them both, which hath his force in giving to every man that

which is his in *præmio, pœna, & debito.* So then in the firſt ſence the word Law is properly applyed; but in the ſecond, it is ſomewhat largely extended; yet uſe and common opinion hath ſo accepted it.

This Law hath for his ſubject and object the Rule of all Divine and Humane things, (except God himſelf) who is the great Rule-giver and Law-maker; and he being *Liberum agens*, is ſubject to no Law; but his own Will is the perfect Law of Juſtice, which is the Fountain from whence all Laws are derived, to all things in Heaven and in Earth.

Law hath a threefold reſpect, and is divided according to the diverſity of things to which this great Law-giver doth diſpenſe Law: They are of three kinds, to wit, the Natural, Senſible, and Reaſonable agents. To the firſt are referred the Elements, and all compounded things without life: They are guided by that Law which was impoſed on them at the begining, and they do never break it. The ſecond, which is the Senſible agents, are all living Beaſts, which are guided not

not with ſo forcible a Law of neceſſity as the firſt; for they are not ordained to keep their certain and ſetled ſtations, but they do follow their own kind and appetite: wherein yet they do not tranſgreſs the Laws of Nature. The third kind of agents, called Reaſonable, are Men and Angels, and they at firſt were created with a poſſibility of performing or not performing the Laws impoſed on them.

According to theſe three forenamed Subjects of Law, there is a threefold Law (as ſome ſay) given unto them; that is, the *Divine*, *Natural*, and *Humane*: The firſt delivered by God, and written by the direction of his Holy Spirit in the Old and New Teſtament. The ſecond, ſtamped and as it were engraved by him in mens hearts. The third, derived out of the two firſt, and deviſed for Government and Society amongſt men. A threefold Law.

Some others do divide Laws into four parts, that is, the Law of *Providence*, or the eternal Law of God, which is his wiſdom, by which from Eternity he that is called *Antiquus dierum*, hath pre-ordained all things be- 1.

fore their beginning, whereof St. *Paul* ſpeaketh, when he ſaith, that *Deus vocat ea quæ non ſunt, tanquam ea quæ*
2. *ſunt.* The ſecond is, the *Divine* Law which God hath given in his Old and New Teſtament, to conduct men unto their ſupernatural end, for his Glory and Service, and for their own final Salvation. Of this *Jeremiah* ſpeaketh by the Spirit, and as in the Perſon of God, *Dabo Legem meam, in viſceribus*
3. *eorum ſcribam eam.* Of the third, which is the *Natural* Law, the Apoſtle *Paul* maketh mention, *Gentes quæ legem non habent, naturaliter quæ legis ſunt fa-*
4. *ciunt.* Of the fourth, which is the *Humane* Law, (warranted by Gods Word) the Apoſtle *Paul* likewiſe ſpeaketh; *Omnis anima poteſtatibus ſublimioribus ſubdita ſit*: So that all theſe Laws have their warrant from Gods Word; ſave the Eternal Law, which was his will and wiſdom, being from the beginning before any Law was written, or could be divulged.

The excellency of the Divine Law.

Therefore next to the Eternal Law, the Divine Law ſpringing from the ſame, hath his place and preheminence, before all other in Dignity and Antiquity;

quity; becauſe from it all other good Laws have their derivation and foundation, or elſe are ſquared by it; and for that it ſuffereth no mutation in it ſelf: In amplitude, becauſe it affordeth the ſelf-ſame Rules and meaſure to all Men, and Nations, without difference of Perſons, Place, and Time, or any other ſuch like circumſtances by which other Laws are often altered. And of this Divine Law, the Decalogue or Ten Commandments, delivered by God unto *Moſes* on the Mount, and by him to Gods people, is a Compendium, or full Epitome of all the reſt; as unto which the reſt may be reduced, as Concluſions drawn out of certain Principles.

The Law of *Moſes*, or of the Old Teſtament, more antient than any humane Law.

The Law Divine delivered by God unto *Moſes*, is in Antiquity before all Humane Laws: for though *Pliny* goeth about to prove, that *Ceres* was the firſt gave Laws unto men, and as others attribute that honour unto *Radamanthus*; yet *Joſephus* writing againſt *Apion*, directly proveth, that *Moſes* was the firſt did promulgate unto men, the Laws delivered unto him from God, and that long before thoſe Law-givers, whom

whom *Iſidorus* nameth, as *Pharonius* to the *Grecians*, *Mercurius Triſmegiſtus* to the *Ægyptians*, *Solon* to the *Athenians*, *Lycurgus* to the *Lacedemonians*, *Numa Pompilius* to the *Romans*.

The Law of Nature next to the Divine Law.

The Law of Nature, is next to the Divine Law, in excellency, antiquity, immutability, and ſeverity: becauſe it began with mans Creation, it never changeth, being nothing elſe (as one defineth it) according to the part of the Law of Nature which is called ſecondary, (whereof we ſhall have cauſe to ſpeak ſomewhat in the next Chapter) but, *dictamen rationis in rationabili creatura*; therefore this Law of Nature ſecondary, is the effect of Gods Law in the mind of man, and the impreſſion thereof; as a ſtep in duſt, is the effect of the foot which firſt framed it: And this ſecondary Law of Nature, is in ſome ſort contrary to that firſt Law, which St. *Paul* calleth the Law of the Members, being a natural inclination to ſenſuality.

After theſe Laws followeth the Humane or Poſitive Laws of men, which being the preſcript and particular rules by which the actions of men ſhould be reduced

reduced and conducted to their due ends, and this grounded on the Eternal, Divine, and Natural Laws, (mentioned before) but yet ſtill meaſured, and moulded by the reaſon, invention, and diſpoſition of men, which is moſt commonly variable and diverſe; no marvel then, if alſo the Laws of men (ſetled upon ſuch ſlippery foundation of different reaſons and affections) be alſo changeable, and ſubject to imperfection; whereof *Juſtinian* in his Preface to the *Digeſts*, doth render the like reaſon: ſaith he, *Sed quia divinæ res quidem perfectiſſimæ ſunt; humani vero juris conditio ſemper in infinitum decurrit, & nihil eſt in eo, quod ſtare poſſit perpetuo: multas enim formas natura novas edere deproperat.* No Humane Laws can be made abſolutely perfect, no more than other Arts and Sciences can be perfected by men; ſince Art is the imitator of Nature, and even Nature her ſelf is imperfect in her works. The concluſion therefore is ſhort, and certain; That thoſe Humane Laws tend moſt (although hardly can they attain) to perfection, which do ſquare moſt, and moſt depend on the Divine, Eternal,

nal, and Natural Laws. And on the contrary, thoſe poſitive Laws of men, are moſt corrupt and unprofitable, which ſwerve moſt from them.

Since we ſee what Laws are perfecteſt, and which are ſubject to moſt imperfection, let us a little conſider what conditions are required in Humane Laws to help them towards perfection: They by *Iſidorus* are deſcribed to be theſe; that is, that they be honeſt, juſt, poſſible, according to nature and cuſtom, convenient and agreeable to the time and place; that they be neceſſary and profitable, manifeſt and perſpicuous, (leſt by their obſcurity the uncircumſpect be intrapped) that they be not made for private profit, but for publick utility: Others require fewer (yet as effectual) qualities in Laws, that is, to contain honeſty, juſtice, poſſibility, conveniency; for the end of Humane Laws is, that by the dread of their puniſhment innocency may be ſafe in the midſt of wicked men.

Certain conditions requiſite to bring Laws towards perfection.

There are alſo certain habilities requiſite in thoſe who are Law-makers, amongſt which the School-men do chiefly

Certain habilities neceſſary for Law-makers.

chiefly eſteem theſe three parts or potential faculties of prudence, *Ebulia*, *Syneſis*, *Providentia*: The firſt is, the faculty of Counſelling, and adviſing aright: The ſecond is, the habit of judging ſoundly, (not ſo much the Caſes of Law already made, as the Conſiderations of Laws to be made:) The laſt, which is Providence, being a fore-ſight of future events; this hath two parts, Circumſpection, and Caution: the one being the conſideration of Circumſtances, leſt any thing be defective in the proviſion of the Law; the other ſearcheth into the Incommodities and Inconveniences whereto ſuch Laws (or they for whoſe ſafeguard it is made) may be expoſed.

What the Philoſopher requireth in making of Laws.

The Philoſopher requireth to the making of good Laws, Authority, Reaſon, general Juſtice, which is honeſty, and Agreement of the People. By the firſt the Law-maker doth bind, by the ſecond he doth know, by the third he doth deſire to make ſuch Laws as ſhall be poſſible, and profitable, not for himſelf only, or for a few, but for all, or at the leaſt the greateſt number; for *Suprema Lex, Salus Populi.*

puli. The notions, and general rules of Nature do teach to ſhun that which is hurtful; but where the Naturaliſt or Moraliſt doth not perſwade, the Politician and Law-maker doth enforce. The Moraliſt doth indeed preſcribe general Rules, and Precepts what ought to be done: But doth not ſhew ſo particularly, how it ſhould be done. The Rules of good and evil preſcribed by Nature, and ſet down by the Moraliſt, are by them both enjoyned to be practiſed, by and to our ſelves; but by the Politician, and Law-giver, thoſe general Rules are applyed and accommodated to the particular Laws of each Nation, to be faſhioned not only for our ſelves, but for others. Therefore it is aptly ſaid, *Ubi Ethicus deſinit, ibi incipit Juriſperitus*; as in Nature, *Ubi phyſicus deſinit, incipit medicus.*

The neceſſity and utiliry of Laws.

Though theſe poſitive and politick Laws of Men cannot attain to abſolute perfection, yet that they are of evident utility and urgent neceſſity, I ſuppoſe no man doubteth. For both nature and neceſſity (the two raiſers of Sciences and Invention) have as it were conſpired to direct, and require the uſe of theſe

theſe Humane Laws; becauſe as it is natural unto men to deſire and to like that which is others, and yet to diſlike and abhorr other men; from whence come queſtions, controverſies, quarrels, oppoſition, and defence: ſo out of theſe doth ariſe an inevitable neceſſity, to lay certain limits (which are Laws and Civil Conſtitutions) by which theſe inordinate deſires, and deſigns of men (being full of diſturbance) ſhould be bounded; and without which, as the appetites and affections of men are reſtleſs, and of themſelves unreſtrained; ſo except they were confined and reſtrained by poſitive Laws, the lawleſs wills of men would make ſociety uncomfortable and unſafe.

CHAP.

CHAP. II.

The differences betwixt the Laws of Nature, of Nations, the Civil and Municipal Laws.

HAving ſaid ſomewhat of the definition and nature of Laws, (eſpecially of the Eternal, Divine, and Natural Law) it now followeth, that we ſhould deſcend to diſcover the differences betwixt the Humane Laws of ſeveral ſorts. Theſe, by ſome, are divided into three branches, (from whence it is ſuppoſed that all other particular poſitive Laws do ſpring and grow :) The firſt is the Law Natural, (whereof there hath been a little ſpoken before) this is defined, to be th t which Nature hath taught all living Creatures: The ſecond is the Law of Nations, which is received amongſt all Countries and People : The laſt is the Civil Law, which every free Commonwealth ordaineth for it ſelf.

Caius,

Caius, a Civil Lawyer, divideth theſe Laws but in two parts; that is, the Natural, and Civil Law: for ſome think, that whatſoever Law is Natural, the ſame is alſo the Law of Nations; and ſo on the other ſide interchangeably. The reaſon is thus; What elſe is the Law of Nations, but that which natural Reaſon hath taught and perſwaded all men, to be equally good for all? So that it is called National, or the Law of Nations, becauſe all Countries have received it: Natural, becauſe it had its beginning from natural Reaſon.

A diviſion of Laws into two parts.

A queſtion concerning the former diviſion.

For the deciding of which doubt, it is to be underſtood, that the Law of Nature is twofold, *Primary*, and *Secondary*; the one being that which Nature (or rather the God of Nature) teacheth all living Creatures; the other, that which Nature teacheth Men. The firſt, called the inſtinct of Nature; whereby it is common to all living Creatures, by the inſtinct of Nature, to procreate, and to ſeek the preſervation of their own kind; to avoid that which they find to preſent death and danger; to re-

The Law of Nature twofold.

peal force with force; to ſeek things needful for ſuſtenance, and the like. This in a general ſence, is called *Jus primævum*, or the primary Law of Nature: And this doth differ from the Law of Nations, which is a Law proper only unto Men, and not to other Creatures. But the Secondary Law of Nature, or of God, (for both is one and the ſame) containeth and comprehendeth the Precepts of honeſty, which God and Nature hath infuſed into Mans heart, at his Creation; given only unto Mankind, and unto him from his beginning; as, to yield Religious reverence to the Supreme and Divine power, to exhibite love and duty towards our Parents, and the like. This latter part of the Law of Nature, doth anſwer and concurr with ſome part of the Law of Nations, which likewiſe (as the former) is twofold, that is to ſay, Primary, and Secondary. The Primary Law of Nations is that which natural Reaſon hath inſigned all Nations, (as hath been expreſſed in the Secondary Law of Nature) therefore ſome have termed the Secondary

The Law of Nations twofold.

condary Law of Nature, the antient Law of Nations. But there is a Secondary Law of Nations, which is no part of the Primary or Secondary Law of Nature; this cometh not by nature, but by a Judgment gathered out of experience and diſcourſe, thereby collecting what is commodious for common ſociety, and equally behoofeful to all Nations; and this is not ingraffed in nature at firſt, but gotten and gathered by uſe and neceſſity, which makes thereof a Law: as, to puniſh offenders and wrong-doers, which is the firſt head of the Secondary Law of Nature, yet not a Rule or Law begotten or bred by Nature. But when the perverſe nature of Man could not contain it ſelf in temperancy, then wrongs offered, publick neceſſity required, that they ſhould be puniſhed who would hurt others, and trouble the common peace and ſociety of Men; leſt the like occaſion of wrong doing ſhould grow general, and ſo in the end hurtful to all: So by this Secondary Law of Nations, grew the diviſion of Goods, the diſtinction of

Properties, free Commerce betwixt Nations, common Contracts, and the like. By this we ſee, that the Secondary Law of Nations is no part of the Law of Nature, and differing alſo from the Primary Law of Nations it ſelf. Now let us ſee next, how the Civil Law differeth or is diſtinguiſhed from theſe Laws of Nature and of Nations.

The ſecondary Law of Nations no part of the Law of Nature.

The Civil Law (or the appellation thereof) is taken in two ſeveral ſignifications; for either it is in a ſtrict ſignification, accounted particularly and only for the *Roman* Law, firſt ſet down by *Papirius*, *Papinian*, *Ulpian*, and others, and afterwards collected into the Inſtitutes, Pandects, or Digeſts, Novels Conſtitutions, and the Feuda, by *Juſtinian*'s commandment: or elſe in a more proper ſence, it is accepted for the particular Laws which every Kingdom and Commonwealth doth conſtitute for it ſelf. And although *Caius*, with other learned Civilians, do confeſs, that the Laws which every City doth make for it ſelf, be properly intituled *Jus Civile*, *quaſi jus*

The name of the Civil Law taken two wayes.

pro-

proprium ipſius Civitatis; yet the *Romans* having gotten under their ſubjection the greateſt part of the known World, gave Laws unto all Nations Conquered by them, which by a kind of Excellency they termed *Jus noſtrum*, or *Jus Civitatis*. Therefore *Juſtinian*, after he had cauſed the Digeſts to be compiled, commanded his Judges, that theſe Laws ſhould be uſed in all Countries; and that his Pretors of the Eaſt, of *Illyria*, *Lybia*, and other parts, ſhould put them in practice: Whereby it came to paſs, that the *Roman* or Imperial Laws were generally called the Civil Laws, and have for the moſt part (in moſt places) been ever ſince ſo obſerved. Whereas otherwiſe, in proper ſence and ſignification, the particular Laws of each free City and State, ought to be called their Civil Laws. But both theſe, that is, the *Roman* and Imperial Civil Laws, and the particular Civil or Municipal Laws of every City, Commonweal, or free State, do not wholly differ from the Laws of Nature and of Nations, nor wholly depend on them;

The Civil and Municipal Laws do not wholly differ from, or depend on the Laws of Nature and Nations.

in this, becauſe the Laws of Nature and of Nations are permanent and perpetual, being alwayes the ſame without any alteration: But the other, that is to ſay, the *Roman* Civil Laws, have been ſubject to many mutations, alterations, and abrogations: So likewiſe all other Civil and Municipal Laws, have been, and are, according to the variation of Times, of States, and of ſundry circumſtances.

The *Roman* Laws ſubject to ſundry mutations.

For example, in the *Roman* Laws, whilſt the *Roman* State was under the Government of Kings, they made ſuch Laws as they thought fit for that time, the preſent ſtate of the City, and their own purpoſes, which were all digeſted into one Volume by *Sextus Papirius*, (as is recorded by *Pomponius*:) But the force of theſe Laws ended with their Reign; and as ſoon as the Commonwealth was tranſported into a New State, at the firſt they could not frame any certain or conſtant Laws; for the Commons and Gentry oppoſing each other for twenty years together, ſuch Laws as were then made, did rather ſeem to

The Laws of the Kings of *Rome*.

The Laws of the Conſuls and Commons of *Rome*.

croſs

croſs and contend one with the other, than to concurr in any mutual harmony for the good of the Commonwealth. For the Conſuls made Laws according to the minds of the Senate, and the Tribunes of the people according to their affections; untill they agreed to ſend certain Legates unto *Athens*, and other Cities of *Greece*, (famous at that time for good Laws and Government) that they might be better pleaſed with Foreign Laws, who envied and held not their own indifferent: Which done, they drew thoſe Laws brought from thence into Ten Tables, to which they added two more of their own; theſe they called the Twelve Tables, (being the grounds of the *Roman* Laws:) But yet two years after theſe Laws were brought to *Rome*, and eſtabliſhed there, the Authority of the *Decemviri* (upon which the force of theſe Laws did depend) ceaſed and was extinguiſhed, by the luſt and licentious life of *Appius Claudius*, being one of them. And although thoſe Laws of the Twelve Tables, continued afterwards as

The Laws of the 12 Tables fetch'd from *Greece* to *Rome*.

grounds of other Laws, yet were they ſtill added to, and altered as the *Roman* State did change. For when the Emperors ſet up their Soveraign and ſupreme Authority, they made ſuch Laws, Edicts, and Conſtitutions, as were anſwerable to their own ends, the ſucceeding Emperor often diſannulling what his predeceſſor had ordained. And as they abrogated the Laws of others, ſo did they not long uphold their own; For who almoſt was there amongſt them, that did not change their own Conſtitutions? Beſides, as the ſtate of the Empire grew greater, they were forced to alter their Laws, with admixture of their Decrees of the Senate, Statutes of the Commons, Ordinances of the Magiſtrates. As the Pretorian Laws (called *Jus honorarium*) which were of great force for the time, but of no long continuance; for they were founded upon the Authority of the Pretors, and did often end with their years. Thus the *Roman* Laws remained in much uncertainty, till the Reign of *Adrian* the Emperor, who with conſent of the Senate, did cauſe theſe

The Emperors of *Rome* make and change Laws at their pleaſure.

The admixture of divers Laws in the City of *Rome*.

theſe Laws to be made perpetual; whence grew the name of *Edictum perpetuum*. But yet in divers ſucceeding Ages, ſundry of theſe Laws were alſo abrogated; and even the Laws compiled in the Pandects and Codes, by *Juſtinian*'s commandment, were ſome of them by him altered, and many taken away in a latter Book called the *Authenticks*. All which is alledged to ſhew the inſtability, change and uncertainty of the *Roman* Laws. The like might be ſaid of the Laws of other Nations, which have been found uncertain in their grounds, and unſtable in their continuance.

Adrian's *Edictum perpetuum* infringed.

Secondly, We may ſee that there is difference betwixt the Civil *Roman* Laws, and the Municipal Laws of other States: For though the *Roman* Imperial (called the Civil Laws) do bear much ſway in moſt Countries of Chriſtendom, and have place in their proceedings of Juſtice, (but leaſt of any place within this Kingdom of *England*) yet have all Countries their ſeveral Cuſtoms, Statutes, and particular Ordinances, diſcrepant

All Countries have ſome particular Laws and Ordinances, different from the Civil *Roman* Laws.

pant in divers points from the Rules of the *Roman* Imperial Civil Laws: which is no marvel, ſince in the *Digeſts* there is delivered as from *Papinian*, ſome diſtinction betwixt the *Roman* Civil Laws, and the Pretorian Laws made in the ſame City; For it is ſaid there, that the Civil Laws did conſiſt of the Statutes of the People, the Ordinances of the Senate, and Decrees of the Princes, with the Authority of Wiſe men: But the Pretorian Laws were thoſe, which the Pretors did introduce to ſupply, to help, or to correct the Civil Law. So is there alledged in the ſame *Digeſts* (out of *Paulus*) another diviſion of Laws: The firſt is the Law of Nature, the ſecond is the Civil Law; the firſt is freed from Injuſtice, the ſecond is deemed profitable to all, or the greateſt part of the City; and there is added, *Jus honorarium*, or the Pretorian Law, as if it were no part of the Civil Law; wherein it is ſaid, the Pretor doth give Law, though he doth determine unjuſtly; having relation not unto that which the Pretor doth, but to that

The Pretorian Law differing from, and correcting the Civil Law.

that which is convenient for him to do. So that it is not to be wondered, that the Municipal Laws of every Country, do differ from the Civil or *Roman* Law; or that the Civil *Roman* Law hath not his full force in all Countries, or that it is not the only Law that governeth in any Country: Becauſe the City of *Rome* it ſelf, did admit ſome other Law to be adminiſtred within the City, than that which was called and accounted their own Civil Law, or *Jus Civile*. And where there was queſtion made before, concerning the Civil Law, whether the ſame were only the *Roman* Laws, or as well other Municipal Laws? Some Civilians do diſtinguiſh them into two parts; the *Roman* Laws they call, *Jus Civile commune*; and the other, *Jus Civile particulare*: To the firſt they referr alſo ſome Municipal Laws, eſpecially thoſe Conſtitutions of the Empire, ſince it was tranſlated to *Germany*, as the *Aurea Bulla* of *Charles* the 4th. Alſo the Conſtitutions and Edicts of the *German* Emperors, in their Diets or Parliaments, which are reckoned

A diviſion of the Civil Law.

The Municipal or Civil Laws of *Germany*.

and

and referred to the common Civil Laws, becauſe they are ordained by Authority of the Emperor; and yet they are in true conſtruction but particular Civil or Municipal Laws, becauſe they bind none but ſuch as are ſubject to the Empire, or to thoſe places of the Empire for which they are made, and which do ſubmit themſelves thereto.

The Municipal Laws of *France.*

So hath the Kingdom of *France* certain particular Civil or Municipal Laws, made in their Parliaments, (which were anciently the Councils of their Kings:) but when the Kings of *France* did ſeparate their Councils of State from thoſe Parliaments, yet the Parliaments have been held in certain Cities of *France,* (as ſaith *Briſon* Preſident of the Parliament of *Paris*) at certain times of the year; The firſt and principal held at *Paris*, eſtabliſhed by *Philip the Fair*, or as ſome ſay by *Lewis Huttin* his Son; the ſecond at *Tholoſe*, for *Languedoc*; the third at *Bourdeaux*, for *Aquitain*; the fourth at *Grenoble*, for *Daulphine*; the fifth at *Dijon*, for *Burgoigne*; the ſixth at *Rouen*, for *Normandy*; the ſeventh

at

at *Aix*, for *Provence*; the eighth for *Bretaign*, inſtituted by *Henry* the 2d. *Anno* 1553.

They have alſo Municipal and particular Civil Laws ordained for the Kingdom of *Spain*, as thoſe ſet down by *Alphonſus* the 9th. And the like for that and other Countries are extant and in uſe. The Municipal Laws of *Spain*.

The Kingdom of *Scotland* hath (as this Realm of *England*) ſeveral and particular Municipal Laws, differing from the *Roman* Civil Laws: As for the Laws of *Scotland*, they are not ſo far different from the Laws of this Kingdom of *England*, as divers do conceive; and that the Laws of *Scotland* are not altogether unlike theſe of *England*, (but in many points do concurr with them) is not improbable: For that there is a Book, concerning the antient Laws of that Kingdom, termed *Regia Majeſtas*; which, as ſome Students (having read the ſame) do affirm, (and as it is ſet forth in the Printers Epiſtle to *Glanvil*'s Book) do agree much, and in many places word for word with the ſaid *Glanvil*'s Book, and doth often vouch

The Municipal Laws of *Scotland* and of *England*, not altogether different.

The Law Book of *Regia Majeſtas* in *Scotland*, like to *Glanvil*'s Book of the *Engliſh* Laws.

vouch him: So that it is ſuppoſed the antient Laws of both theſe Realms did then agree, and do yet in moſt points; which have not been altered by Statute ſince in either of theſe Realms. Alſo King *James* in one of his Speeches (made to the Knights and Burgeſſes of the lower Houſe of Parliament) did pronounce and declare, that the Tryal in the Chancery of *Scotland*, was brought from this of *England*, ſhewing the time, Author, and occaſion thereof. Therefore it may be conceived, that there is not ſuch great diſcrepancy or contrariety betwixt the Laws of both theſe Kingdoms; but that by due examination it will be found, that there is, or at leaſt may be, a conſonance betwixt them in many, if not in moſt points. But for the Laws of *England*, how they do differ from the Civil and other Laws, ſhall be ſhewed in the next enſuing Chapter.

An opinion that the Laws of both theſe Kingdoms, may in main points be conveniently made all one.

CHAP.

CHAP. III.

Of the grounds of the Laws of England, *and how they do differ from other Laws.*

OUr Laws of *England* do differ, as in name, ſo in divers other circumſtances, conſiderations and conditions, from the Laws of other Kingdoms and Commonweals.

Firſt, for the name; they receive a common appellation of the Common Laws of *England*; a name ſcarce given to the Laws of any other Nation: Therefore whence it received this denomination of the Common Law, may breed ſome queſtion. Some ſay, that it is called the Common Law, to diſtinguiſh it from the Laws of particular Cuſtoms, or of Cuſtoms allowed for lawful within this Realm: But this is not certain, nor ſcarce probable; as ſhall be ſhewed anon, when it ſhall be demonſtrated, that theſe Cuſtoms allowed for Law, are rather made parts, than diſtin-

Why our Laws are called the Common Laws of *England*. 1.

diſtinguiſhed from the Common Law.

2. Some others ſuppoſe, that it is called the Common Law of this Kingdom, to make difference betwixt it and the Statute Laws; which as they are of another kind of conſtitution than is the Common Law, (as will be made evident) ſo are they of ſeveral ſorts in themſelves; as ſome of theſe Statutes are general, and ordained for all the Subjects; ſome are particular, and made for the ſettling of particular mens Eſtates, and of particular Trades, Corporations, and Faculties: Therefore theſe cannot be (nor may not be called) the Common Laws of the Kingdom, (that is, common to all) but only in this ſence, becauſe they are conſtituted with the common conſent of all. The

3. third opinion is, that they are called the Common Laws of the Kingdom, becauſe all the Subjects of this Kingdom muſt live under them, and may challenge them as their Birth-right, for the defence of their Eſtate, Right, and Liberty. In which ſence alſo the general Laws of any Kingdom or Commonwealth may be called their Common Law. How-

Howſoever it may be a queſtion, how at the firſt the name of our Common Law came, or how the ſame may differ from the Statute Laws, or from any other Law allowed within this Kingdom; Yet it is certain that the Term and title of the municipal Laws of this land, is both proper to our Laws and doth include all our Laws, as well the Statute as Common Law. Firſt, it is proper in that our Laws of this land are peculiar to this Kingdom and the territories thereof (and thereto adjacent) being not elſewhere in uſe or allowed. Now for the Municipal Laws of this Kingdom (under which title the ſpecial and particular kindes of our Laws of *England* may be moſt aptlie comprehended) ſundry perſons have made ſeveral Diviſions thereof: Some have divided them into Cuſtomes, which is like to the *Civilians Jus privatum*, and into Statute Law; others into Common Law, Cuſtomes and Statute Law; This laſt Diviſion conſiſting of three parts *Seingerman* (in his fundamental partition of our Laws) doubleth, by adding thereto another foundation

The municipal Laws of *England* is the moſt proper Title of our Laws.

The diviſion of our Laws of *England* into ſeveral parts and grounds.

Another diviſion of the grounds and parts of the Laws of *England*.

and diviſion of our Laws, which is the Law of God, the Law of Reaſon, and certain principles or maximes which (with the three former) he maketh as ſeveral grounds of our Laws of *England*. They which ſtand to the firſt bipartite diviſion of our Laws, (ſetting them to ſtand only as it were upon two leggs) do conjoyn Cuſtom with our Common Law; for they ſay, what is any Cuſtom allowed by the Laws of the land but the Common Law of the land? ſince that the Judges (to whom delegation is made for the determination of civil Cauſes) do admit thoſe Cuſtoms to be pleaded before them, and do give judgment for the ſame: yet the difference between them will be; firſt, that theſe Cuſtoms do not equally extend throughout the Realm, and therefore if they be incorporated into our Laws, they are but private, and not our Common Laws: Secondly the *Judges* do *ex officio* take notice of the one, but not without a ſpecial pleading of the other: So it may well be ſaid in ſome ſort that Cuſtomes allowed for Laws, or for lawful, may be made ſome part

Whether Cuſtoms allowed for lawful be ground, or made parts of our Law.

of

of our Laws, but yet I can hardly allow them the honour, to be made grounds of our Laws, unleſs they be firſt reduced to certainties, and ſo be made as it were *maximes*. So are general received opinions by Cuſtom, continuance, and approbation of authority and Judgment, made Common Laws; whereto ſome add this rule, *Communis error facit Legem*. As for the other addition of St. *Germans ſextuple* diviſion of our Laws of *England*, although he hath therein ſhewed ſome learning (yet without offence be it ſpoken) he hath muſtered together divers things different in name, but the ſame in nature. For what is the Law of reaſon, other than the Law of God (if it be rightly underſtood) becauſe what proceedeth from reaſon (not darkned with the clouds of error,) but ſuch things as were *characlered* in the ſoul by him, which firſt framed it, according to his likeneſs? And ſaith *Seneca*, *quid eſt ratio?* he anſwereth himſelf, *naturæ imitatio*. Therefore that our Laws of *England* are compoſed and wholly framed on the Laws of God is more than may be

St. *Germans* diviſion of the grounds of our Laws not allowed.

ſaid of them, or of any other humane poſitive laws; but that they do depend on them, and not mainly differ from them may be well and truly juſtified.

Now for as much as there hath bene mention made of three principal parts of our municipal Laws, let us a little take ſome particular and ſeveral view of them what they are: they are ſaid to be the Common Law, the Statute Law, and Cuſtoms allowed for law.

The particular parts of our Law examined.

The firſt, which is the Common Law of this land, conſiſteth partly of the collection of ſuch laws as were allowed by King *William* the Conquerour, who neither wholly introduced his *Norman Laws*, nor altogether allowed of the former, but out of the beſt parts of either, took that which was fitteſt for the time, and preſent government. The former laws which he allowed of, were ſuch of the *Saxons* and *Daniſh* laws, as he found fitteſt for the time.

What Laws King *William* the Conqueror allowed in England.

And firſt of the *Saxons*, who came into this Kingdom about *Anno* 449. whoſe King *Ethelbert* of *Kent* did conſtitute

ſtitute (as *Beda* ſaith) *decreta judiciorum, cum conſilio ſapientum, quæ conſcripta* (ſaith he) *Anglorum ſermone, hactenus habentur & obſervantur.* The ſucceeding *Saxon* Kings did in their *Wintenagemotes* or *conventus ſapientum* (which were in the nature of *Parliaments*) make diverſe conſtitutions *cum conſilio ſapientum & ſenatorum, cum Epiſcopis*; as that Learned and induſtrious gentleman Mr. *Lambert* affirmeth, who compiled ſome of them into one book, as the Laws of *Inas*, *Alfred*, *Athelſtan*, *Atheldred*, *Canutus*, *Edgar*, *Edward* the Confeſſor, and others; out of which the Conqueror took ſuch as he thought convenient, whereof ſome are enumerated by the forenamed Mr. *Lambert*, and by *Hoveden*. Alſo *Gervaſius Tilburienſis*, he ſaith of the Conqueror: *decrevit ſubjectum ſibi populum viri ſcripto, legibuſque ſubjicere: propoſitis igitur Legibus Anglicanis, ſecundum tripartitam earum diſtinctionem, hoc eſt Merchenleg, Daneleg, & Weſt Saxenleg; quaſdam reprobavit, quaſdam autem approbans*, &c. So then we ſee that King *William* the Conqueror took ſome of the ancient

Some part of the *Saxon* and *Daniſh* Laws allowed by the Conqueror.

The Conquerors allowance of the former Laws.

The firſt part of the Common Law of *England*.

Laws of this land, which is the firſt part of our Common Law of *England.* The reſidue which came for a ſupply unto the ſame, ſprang out of the judgments given ſince in particular caſes upon arguments made before, and by the learned *Judges* of this Land.

The ſtatute law differing from the Common Law, yet a part of our Municipal Laws.

The ſecond part of the Municipal Laws of this land (though not properly called but differing from the Common Law, as the *Pretorian* Law amongſt the *Romans* did differ from their Civil Law) is the ſtatute Law of this Realm, made by the King as head, with the Nobles and Commons, as members of this body politique.

This Law was invented to give ſpeedy remedy and redreſs unto ſuch ſuddain matters as were miſchievous in the Commonwealth, the puniſhment and prevention whereof was defective, diſpuniſhable, or not fully provided for, by the Common Law; the firſt of which ſtatute Laws now extant was made in the nineth year of King *Henry* the third. For the making of Statutes and aſſembling of Parliaments (in which they were ordained)

The firſt ſtatute law that is now extant.

dained) he which will diligently read the ancient Stories of *Malmesburie*, *Huntingdon*, *Hoveden*, and *Math. Pariſienſis* (eſpecially above others) ſhall find that there are no ſmal miſtakings in ſome things about the antiquity and true conceipt of their Cuſtoms and ſtrength.

There is (according to the partition of ſome) another part of our Law (or at the leaſt, a derivative out of the ſame) that is, the Cuſtoms held for Law, or judged lawful, which have been allowed of ancient times in particular Counties and places of this Kingdom, as in *Kent* they have many, and eſpecially that of *Gavelkind* throughout the whole Country, whereby as well the youngeſt as the eldeſt Son ſhould equally inherit, which they reſerved and retained by offering battel to King *William* the Conqueror. The Cuſtom of Borough Engliſh is another, whereby the younger Son is only inheritable, and this is particular to ſome ancient Boroughs, and peculiar only unto them. There is likewiſe the Cuſtom of *Gloceſter* Honour, containing many priviledges

Cuſtom laws, another part of our Laws as ſome hold it.

ledges particular to that place. So have diverſe other great Lordſhips, Mannors and ſome Corporations their particular Cuſtoms and ſpecial priviledges, which are therefore properly called priviledges, *quaſi privatæ leges*; and theſe having by long Cuſtom and conſent had continuance and allowance, they are thereby made lawful, and in ſome ſort ſtiled and reckoned as part of our Laws, although in ſome points they do differ from the rules of the Common Law. And therefore the *Civillians* call ſuch Cuſtoms, *jus ſingulare, quod contra tenorem rationis propter aliquam utilitatem, authoritate conſtituentium introductum eſt.*

How priviledges are called Laws.

That the Laws of *England* do differ from the Laws of other Countries, there is no doubt; as there is no Country but hath ſome conſtitutions contrary to any other even of their neighbour Countries Laws.

But if any do demand how the Laws of *England* do differ from other Laws, it may be found ſomewhat in their inſtitution and foundation, more in their form and method, but moſt

Wherein the Laws of *England* do differ from other Laws.

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in the courſe of their proceedings and execution.

For the firſt it is apparent that the Laws of other Countries (for the moſt part) are grounded, or do fetch their Rules from the *Roman* and Imperial Civil Law, but the Laws of *England* are not founded, nor do any way depend, on the Civil or *Roman* Imperial Laws. For the Laws of *England* take their grounds from the conſiderations and Rules of reaſon, equity and general reſpects; weighing therewith what is convenient or inconvenient to the whole Commonwealth, or the greateſt part thereof, and holding it for a general Rule to be ſafer and better to ſuffer a miſchief than an inconvenience. 1.

The Laws of *England* take not their grounds from the Civil *Roman* laws as other laws do.

The ſecond difference betwixt the Inſtitution of our Laws and the Laws of other Countries is, becauſe the Laws of this Kingdom are not made by the *Prince* only, as ſometimes the Laws of the Empire and of ſome other places were, where the *Princes* had both an affirmative and *a Negative power* in ordaining Laws for the people under them. But in *England*, as the 2.

The *Prince* doth not of himſelf alone make the Laws of England as the Emperor, and other *Princes* have done.

the Laws concerning penalties in Criminal cauſes, or in Civil, cannot be enacted and eſtabliſhed without the Kings Royal approbation: So doth not the King make theſe Laws without the conſent of his *Parliament.*

3. The Laws of *England* do likewiſe differ from the Laws of other Countries, firſt becauſe the Common Law of *England* is not all written and certainly ſet down; but doth reſt much as ſome ſay in *Pectore Judicis*; and alſo it doth differ in Method from the Civil Law and from ſome other Laws, becauſe it is not digeſted into Method by Titles, Chapters and diſtinctions. For the firſt, though it were to be wiſhed that the Common Law were all written, and that it were ſo made certain (if that might be poſſible) as it ſhould not need to depend upon private and particular opinions; yet if that may not be, the inconvenience is not altogether ſo great, as ſome conceive it: for all Countries have not had their Laws written and ſet down alike: The *Athenians* uſed only written Laws: The *Lacedemoni-*

The Law of *England* not all written nor all ſet down in Method.

Some countries had their Laws written, and ſome had not.

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ans had none written: The *Romans* had both.

The laſt difference betwixt the Law of *England* and other Laws, but eſpecially the Civil Law, being in the proceedings and execution thereof, which will appear principally in theſe three parts; Firſt, in the manner of Summoning (as we ſay) or Citation (as the *Civilians* call it.) Secondly in the form of pleading in the *Courts*. Thirdly in the Judgment or *Sentence*, to which may be annexed alſo the *Execution* upon the ſame. 4. Three differences betwixt the Laws of *England* and the Civil Laws.

For the manner of ſummoning, or citation (by that which was anciently uſed in *Rome*) a man might of himſelf without any proceſs, cite his Adverſary, and compel him by force to come into the Court; whence the *phraſes* of *in Jus rapere*, *in Jus ducere* and ſuch like, are uſed by *Plautus*, *Horace*, and other authours. This was not in ure at any time within this Kingdom of *England*, but it hath been held better, and always fit, That there might be ſome proceſſe ſent forth, and ſo a plainer, more peaceable and lawful courſe ſhould be taken, 1. Difference in ſummoning or Citation.

taken, (as if the King who is the head and fountain of *Juſtice* or the Judge under him had been firſt informed of the *Suite*) the like courſe was afterwards and is now taken in the Civil Law. For a *Citation* by *Math. Wiſenbich* is demed to be, *actus Judicialis, ſeu Judicii præparatorius quo is, quem coràm ſiſti opus eſt, Judicis mandato legitime vocatur, juris experiendi cauſa*; of which (according to other Civilians) he in his paratitles maketh three parts, 1. *Præceptio Judicis*, 2. *Verbalis citatio nuncii*, 3. *ejuſdem nuncii relatio, quæ* (ſaith he) *niſi exactis appareat, non valet citatio.* In theſe three parts of ſummoning or Citation, the Civil Laws and the Laws of *England* do not diſagree, ſave that in *England* the Writ of Sommons in many Caſes, and in ſome Courts, goeth out in the Kings name. Alſo for the conventing and ſummoning of any man before the *Judge*, greater Liberty is given by the Law of *England*, than was antiently allowed by the Civil Law. For by the Civil Law, a man might not convent a Magiſtrate, nor *Judge*, nor one

Three parts of a Citation according to the Civil Laws now uſed.

The Writ of Summons in our Law goeth out in the Kings name in ſome Courts, but not ſo in the Civil Law.

By the Civil Law one might not convent a Magiſtrate, &c.

one that was marrying a wife, or a man that is performing the Funerals of his friend, or a man that is pleading or following his Cauſe before a Judge, *nec parentem patronum; parentes patroni in Jus* (ſaith the *Prætor*) *ſine permiſſu meo, ne quis vocet.* But by the Laws of *England*, none are exempted from Suite; only *Dukes*, *Earles*, *Barons* and their Wives are priviledged, that a man cannot attach or take their perſons by *Capias*, both for the honour of Nobility, and becauſe it is ſuppoſed they are never without ſome goods or land, which may ſatisfy the Debts. But if the action be againſt the Crown and Dignity, or *Contra pacem*, then for their violence, their bodies alſo were ſubject to the Kings Writ. The ſame Law is of *Abbots*, and *Priors*. But the Civil Law alloweth a greater Liberty, and ſaith generally, *eas perſonas quibus reverentia præſtanda eſt, ſine juſſu Prætoris in Jus vocare non licet.* And yet although the Civil Law be more liberal in allowing exemptions from Citation, and ſummoning of perſons to appear, than is our Law of *England*; notwithſtanding there is difference

None exempted from Suite by the Laws of *England*.

The Civil Law allowed more exemptions from appearing to Suits than the Law of *England*.

rence betwixt theſe Laws in the form of Suite and pleading upon divers proceſs (wherein theſe two Laws might perhaps correct each other) whereof but a touch ſhall be given at this time, and it may be more ſhall be ſaid at the concluſion of this tract, when the remedy and redreſs of ſome things conceived to be amiſs in our Laws ſhall be ſpoken of.

The ſecond difference in the form of pleading.

The ſecond point concerning the difference betwixt our Laws of *England*, and the Civil Laws being in the form of pleading and diverſities of proceſs; For the firſt, which is the form of pleading, only they agree in this, That both the Laws have had a ſpecial reſpect of nice obſervation, and alſo have endured alteration in pleading. For firſt the Civil Law, after that in *Rome* the *Decemviri* had gotten the Law of the 12 Tables, and that Interpretation grew frequent upon them, then ſaith *Pomponius*, *Ex his legibus, eodem fere tempore, actiones compoſitæ ſunt, quibus inter ſe homines diſceptarent, quas actiones ne populus ut vellet inſtitueret, certas ſolenneſque eſſe voluerunt, & appellata hæc pars juris, legis*

legis actiones ; id est, legitimæ actiones: and immediatly after saith he, *Omnium harum interpretandi scientia & actiones apud Collegium pontificum erant,* &c. Afterwards the Actions were, (as *Livy* reporteth) and the Book of them, gotten by *C. Flavius* Secretary to *Appius Claudius*, was by him publisht and so communicated to the common people, for which they bestowed on him the Tribuneship and other *Magistracies* ; they called that Book *Jus Civile Flavianum:* Like to which also *Sextus Ælius* framed another which was called after his name *Jus Ælianum.* These *formulæ Juris* were used very strictly; for saith *Wesenbechius, Olim ut omnia ordine,& recte procederent, & ne temere, sineque causa quis ad jurgia & lites conudaret: impetrandum erat à prætore judicium, qui actori postulatam à se actionem impertiebatur, & formulam agendi disceptandique pedaneo judici, & litigatoribus præscribebat.* So that then by the Civil Law, the planitiffe did get his form of pleading from the *Judge*, or *Prætor*, which was afterwards upon experience of inconvenience altered by the

the reſcript of *Conſtantine* (which *Juſtinian* hath put in his *Code*) likewiſe *Theodoſius* and *Valentinian* hath done the ſame. But the difference betwixt this and the pleading of our Common Law is, That at no time was the plaintiffe tied by the Common Laws of *England* to receive his whole form of pleading from the *Judge*, although it be true that he is required to ſet down a ſtrict form of pleading according to the Law upon his own peril.

A ſtrict form of pleading required but not particularly preſcribed by our Laws.

Alſo another difference there is, in the forms of pleading betwixt theſe two Laws. Firſt, that our forms of pleading do differ according to the different forms of pleadings and declarations in ſeveral Courts, which the Civil Law doth not. Secondly, and particularly, the form of pleading in the Civil Law is, in all actions perſonal (becauſe they do *ex obligatione tanquam cauſa proxima competere actoribus*) in the Libel you muſt expreſs the remote Cauſe and not only the next Cauſe: as for example, I lend mony to *Titius*, now I may have an Action againſt him for it; The remote cauſe

Different forms of pleading in our own Law in ſeveral Courts and much more betwixt both the Laws.

is

is the lending, the next and immediate of the Action is the *obligatio* as they call it. Now if I Libel againſt *Titius*, if I ſay, *Ago ad decem, ad quæ Titius eſt mihi obligatus.* This is naught, ſaith *Minſinger* (ſhewing it out of other authorities) becauſe the remote Cauſe is not in the Libel: But if that had been in alone, that had been good, as *Mutuam Titio decem, peto eum condemnari.* But in real Actions they go *inverſa via*, putting in always the next Cauſe, but not of neceſſity the remote; (but at the pleaſure of the Advocate) as, *Peto fundum iſtum à Sempronio, quia ejuſdem ſum dominus fundi*; here the *dominium* is the *Cauſa proxima*, and if the Advocate dare venture it, he may ſay alſo, *ſum dominus quia emi*, where the remote Cauſe is alſo contained. A very nice difference which is not exacted in the form of pleadings in our Law. But it is uſual with us, that in every Mans real, perſonal, and mixt Actions, the *Cauſa propinqua* and *remota* are both put in the Declaration; yet ſo that in the Common Pleas in the Writ commonly is expreſſed the next Cauſe, and in the

The Civil Law in perſonal actions doth expreſs the remote cauſe in the Libel, but in real actions the next Cauſe.

How in our Law the remote and next Cauſe are both expreſſed in all actions.

Declaration which containeth the Writ alſo, the remote Cauſe (but in ſome the Writ doth contain the other) as in waſt, the Writ *quare fecit vaſtum in terris quas tenuit ex dimiſſione ad exhæreditationem*, here is the remote Cauſe: But in Action of Debt, *præcipe quod reddat vj. libr. quas debet*; here is the next Cauſe and the Declaration contains the remote, as Contract, Bargain, *&c.* Neither is there any Declaration in our Laws (as the form is now uſed) but contains both Cauſes in it: beſides there are other differences betwixt the forms uſed in the pleadings and declarations of both the Laws, which would be too long and tedious to recite.

3. The third difference in the awarding of Proceſs.

The next difference is in the Proceſs awarded in both the Laws. Concerning the awarding of Proceſs we find that with us in perſonal actions (I mean in many of them joyning Statute Law and Common Law together) there are commonly awarded (if the Suite be commenced in the Common Pleas) ſummons, attachment, diſtreſs, three *capias* with an *exigent* at the laſt, whereby the King hath

In Actions perſonal more Proceſs and delay permitted by our Law than by the Civil Law.

hath Title for the parties contumacy to his Goods and Chattels.

So that the plaintiffe hath now remedy by accident only, and if the defendant appear and reverſe the Outlary, or get pardon and ſo anſwer, *&c.* (which is a long time before this can be brought to paſs) and by this means this Suite may depend long, yet the defendant never convented, but at two or three years end, the plaintiffe may be driven to declare anew (as if he had but then begun his Suite.) But by the Civil Law, as the *Pandects* ſhew us, and *Weſenbech* affirmeth the Term to be now in the Empire, *poſt abſentiam adverſarii, petat quis edictum primum, mox alterum, per intervallum (non minus decem dierum) & tertium: quibus propoſitis, tunc peremptoriè impetret, quod inde hoc nomen ſumpſit, quod perimeret diſceptationem, hoc eſt ultra non pateretur adverſarium tergiverſari.* Then if the defendant appear at the day given him by the *Peremptory edict*, or if he do not, the matter ſhall be diſcuſſed, and judgment given for him whoſe part ſhall be found beſt. But if the plaintiffe appear not, then

No judgment given in the abſence of the plaintiffe at the Civil Law.

nothing ſhall be done but *circumducendum erit edictum perpetuum.* And the peremptory edict may at the pleaſure of the Judge be granted, at the firſt by the ſame authority: So that hereby the Intereſt of the party who hath right, is leſs ſubject to prejudice by that Law than by ours. And this courſe of the Civil Law doth not admit ſo much delay as doth our Common Law. For by our Law in ſuch Caſes where no Outlawry lieth in perſonal Actions, there the Proceſs of diſtreſs goeth out infinitely, and then is there no end of the Suite, as in *per quæ ſervicia, quæ juris clamat*, and ſuch like; wherein it is true, that our Law ſeverely puniſheth the party which ſo much ſheweth contumacy to the Law, yet doth it no good or very little to the plaintiffe for his ſatisfaction.

The intereſt of the plaintiffe leſſe ſubject to prejudice in Actions perſonals by the Civil Law than by our Law.

But there is another difference, that in Actions altogether real, as Entry, Eſcheate, Right, Dower, and ſuch like, the remedy allowed by the Laws of *England* is far better; for in them if at the day appointed, upon the firſt ſummons, the party make default, and the *quarto die poſt* be paſt, then is there

there a *graund cape* to take his land into the hands of the King, and the plaintiffe ſhall have it from the King by judgment if the defendant do not come to replevy it by oath, that he was not ſummoned according to the Law or ſuch like (always remembred that *Eſſoynes* upon juſt occaſion may herein breed much delay.) And herein is there much difference betwixt the Civil Law and our Law, for in the Civil Law upon their peremptory edict, notwithſtanding the defendant doth not appear, the right ſhall be examined and thereupon judgment given, but with us upon the default at the *graund cape*, the plaintiffe ſhall have the land by judgment although the right be not examined. As alſo upon the appearance if by oath he cannot ſave the firſt default, likewiſe if he once appear and afterwards make default, before judgment given there muſt be a *petit cape* awarded, at which Writs return if he do not ſave the firſt default, there ſhall be judgment given againſt him. That all this was antient Law may be ſeen in *Bracton* Treatiſe *de defaltis*.

A main difference betwixt the proceeding of our Law and the Civil Law in Actions real.

In perſonal actions the Civil Law is more ſevere, but in real more remiſs than our Law of *England*.

So that in perſonal actions the Civil Law hath a more ſevere and ſpeedy courſe for recovery than the Common Law of *England*, but in real actions it is ſomewhat more remiſs, or at the leaſt ours is more ſevere.

4. The laſt difference is in the giving and Execution of judgment.

For the laſt difference ſpoken of betwixt theſe Laws which is for the giving of judgment and Execution upon the ſame in real actions being in *rem*, although the form and circumſtance thereof may be divers, yet in theſe real actions *quoad ſubſtantiam & effectum*, the difference is not very great, for both Laws muſt make Execution of the ſame thing, though perchance not in the ſame manner; But for perſonal actions it is manifeſt by the courſe of antient and preſent times that for Debt ever ſince King *Edward* the third his time, and damages and accompt ever ſince *Henry* the third his time, in actions upon the Caſe ever ſince King *Henry* the 7th. his time, and in all actions where *Capias* lieth in the Proceſs before judgment, there *Capias ad ſatisfaciendum* lieth after judgment to put the party in priſon for Execution;

Execution againſt the perſon after judgment by our Law in actions perſonal.

than

than the which although a more rigorous Law were by the 12 Tables, whereby *Corpus inter creditores ſecari licebat* (whereof *Rivallius* ſaith an example is not read in any Hiſtory or other Book) yet afterwards by their *Lex Petilia* it was decreed (as *Livy* reporteth) that no man ſhould be for Debt, *nervo aut compedibus vinctus*, which notwithſtanding was uſed ſometimes by the violence of *Uſurers*, and therefore ſometimes renewed by the Laws *Portia*, *Sempronia*, *Popilia*, and other, whereby *terga civium* were made *tanquam ſacroſancta*. Alſo by the *Lex Julia*, if the Debtor would leave his goods his Body was free, as appears by the ſame, reported in the *Code*; But this Law *Hottoman* thinketh not to extend unto *Banquerupts*, or ſuch as are *non ſolvendo* by their own default. But by the *Authentiques* and *Latine* Law, if a man were poor by ſome external misfortune and not by his own means, if he would *ejurare copiam bonam*, he need not leave his goods for his Creditors, nor ſubject himſelf to Priſon; which is ſo mild a Law towards

The Civil Law more mild of latter time than ours for Execution againſt ones perſon in debt, &c.

Debtors, that it hath no proportion with ours. But where by our Law we do not admit that Beaſt for the Plough ſhall be taken upon *Elegit facias* which is conſtituted by the Statute of *Weſtminſter* the ſecond (although that be referred by *Polydore* to *Malmuſius* Law) therein the Law of this Kingdom agreeth with the Civil Law, as it appeareth in the *Code:* ſo that we ſhew in the Execution of judgments there are ſome differences even in the Civil Law it ſelf according to the alteration of times; at the firſt far more ſevere, but in the end much more mild. And alſo by theſe forementioned examples there are differences betwixt the Civil Law, and our Laws of *England* in the Execution of their judgments. Many more differences might be found, both in this and in the other forenamed points betwixt both the Laws, if time did ſerve or were required to ſearch and ſet down the ſame. But this may ſuffice as a taſt for this time and purpoſe.

The Civil Law differed from it ſelf in different times for Execution on mens perſons.

CHAP.

CHAP. IV.

An anſwer to certain Objections uſually made againſt the Laws of England.

BY way of imputation or indeed of Scandal, there are uſually amongſt others, theſe Objections made againſt our Laws of *England.*

1. That they are written in a Barbarous ſpeech; even to Scholars unknown or not underſtood. 1.

2. That they are framed without Method or order. 2.

3. That they have no Maximes, or fundamental grounds whereon they conſiſt, or at the leaſt not ſuch as are certain. 3.

4. That the Judges opinion (which may be extended according to *humane affection*) doth make or alter the Law: ſo that it conſiſteth not (ſay they) in *ſcrinio principis*, that is, in the Records of the State, but in *ſcrinio pectoris* of the Judge; the key whereof the Judge may alter, and by a new lock faſtened on, make a way to come 4.

at

at unheard of reaſon, according to his own conceipts, which muſt be admitted for Law, at the leaſt for the time.

1. For the firſt Objection, I conceive it to flow rather from ſome ſuddain miſlike before the matter be underſtood, or elſe ſome quaint and dainty palate, who diſtaſts all things (be the matter never ſo ſound and ſubſtantial) which doth not ſavour of perfumed eloquence, and poliſhed phraſes of Rhetorick, than upon due conſideration of the language it ſelf; for although it muſt be confeſſed, that the ſpeech and phraſe wherein our Law is written is rude and unpoliſhed, in reſpect that no Nation ſpeaks it as it is now written, and that the ſame Nation from whence it is derived cannot underſtand it preciſely without inſtruction, yet that it is ſimply Barbarous, or that thereby the Law receiveth any diſgrace may well be denied. For firſt, admitting there were no other aide in the defence hereof, than that which the Lord chief *Juſtice Coke* hath in his preface to his third Book of Reports, *Siquidem rela-*

relationum iſtarum phraſis aut ſtylus tibi minus arrideat, ut rei ipſius ſubjectæ præſtantia atque utilitas, & delectet & ſatisfaciat? Unde fiat ut totum te admirabili plane dulcedini cogitationis atque ſcientiæ dedas & addices. Admitting that this were the effect of the defence, ſurely we alone ſhould not be driven to this ſhift, to praiſe only the matter, and to reject or omit complements of form; for let the opponents herein but view other faculties (which they that profeſs thoſe faculties would have to excel either of the Laws *multis paraſangis*) obſerve but the excellent part of the mixt *Mathematiques*, as judicial *Aſtrologie*, it will not be denied but ſome, nay moſt of their antienteſt Authors (eſpecially which wrote in *Latine*) do by their Barbariſm in the *Roman* tongue, equal the worſt ſeeming *Soloeciſmes* in our Common Laws: witneſs hereof *Haly Ben Rodan* his Comment upon the *quadripartite* of *Ptolomy* in *Latine*, to whom may be added *Guido Bonatus* moſt eſpecially, with *Alchabitius* and *Johannes de Saxonia* his paraphraſe upon him; it may be truly ſaid, that a pleading

Other Arts written in as ill ſtile and phraſe, as is our Law.

ding in *Weſtminſter-hall* for *Latine*, or a Caſe argued in a private Inn of Court moote for *French*, ſhall reſpectively in many phraſes and good words exceed moſt of theſe authours, nay in this Art the beſt tongued authour (namely *Julius Firmicus*) is accounted the worſt *Artiſt*. How many *Latine* phraſes or words are there to be found in the ſide of a leaf in any of the chiefeſt and antienteſt School Divines (who reſpected not the language, but the points of learning which they handled.) Neither in this, or almoſt in any other ſtudy doth the language add to the Art, ſeeing that as the ancient *Hieroglyphicâl* notes to expreſs words and ſyllables were added only as inſtruments of memory and tradition, and in other Arts the *voces ſecundæ intentionis* (as the *Logicians* call them) being the Terms of Art, give no grace to the ſtudy or language, but only help to learn the Art whereof they are written; therefore the language is but an inſtrument to the ſcience which it contains, and is as it were the Table wherein is pictured the ſence of the Law. So the *Civilians* ſay,

The beſt Authour in ſome Arts writeth the worſt phraſe and ſtile.

Terms of Art do not give grace, but help to learn the Art.

ſay, *tabula picturæ cedit*, and yet moſt modern languages (nay in a manner all) have bene forced to borrow from other, words, and names, eſpecially of Art and invention: neither can the lofty ſtiled *Greek*, or the more penurious yet pleaſant *Latine*, name all things in their own language according to their proper Nature, except they participate of the *Hebrew* which doth name things according to their Nature, but that cannot be done by any other language ſo fully.

Moſt languages forced to borrow words of others.

Beſides all this, it may be ſhewed that the ſpeech wherein the Law is written, is not to be ſo much diſliked *in ſuo genere*; for it appeareth by the Hiſtories of ancient time, that when the *Normans* came hither, the pleading of Law, Statutes, and ſuch like things were commanded to be all in *French*; ſo ſaith the *Abbot* of *Croyland*, *Normani enim ipſum idioma tantum abhorrebant, quod leges terræ, ſtatutaque Anglicorum Regum lingua Gallica tractarentur, & pueris etiam in ſcholis principia literarum grammaticarum Gallicè & non Anglicè traderentur.* Whereupon (as it appears) our

The Conqueror commanded the pleading and Statutes to be done in French.

Statutes

Statutes which are extant, eſpecially thoſe of *Edward* the firſt his time (though not all) *Edward* the ſecond, *Edward* the third, and ſo forward, were the reports in the Nature of *reſponſa prudentum* among the *Romans*, taken and publiſhed in *French*, which then was not accounted Barbarous, for in likelyhood it was the ſame language which at the firſt was ſpoken amongſt the *Normans*; and ſo were all Pleas at the Barr pleaded in *French* until the 36. of *Edward* the 3. which although it were not ſo good *French* as *Dubertus* his days and weeks, yet it came then in a manner near to *Froſſard* his *French* in his Hiſtory (which was made about that time) as *Apuleius* his *Latine* being no *Roman*, did unto the phraſes of *Livy*, *Cicero*, and ſuch like. Some corruption there muſt needs be in tract of time, of a tongue ſpoken in another Country, and conſonant with another different language, as the *French* was here. It is evident that the antient Books, as *Britton*, *Henghim*, and the year Books of the firſt ſucceeding ages are in better *French* than our later Books are, becauſe

Our Laws written at the firſt in French came then near the ſpeech at that time uſed.

our

our common Lawyers now do imitate the antients in ſuch words, as they have there learned, and if they want a fit word in *French*, then do they as Sr. *Thomas Moore* ſaith of *Lalus*,

Gallicis ſi quid nequit vocabulis,
Conat id verbis licet non Gallicis,
Canore ſaltem perſonare Gallico, &c.

So that indeed, the tongue wherein the Law is publiſhed of late hath been much mingled with *French*, *Latine*, and ſome *Engliſh*; that a man might compare it to that ſuppoſition of *Horace*, *Humano capiti, cervicem pictor equinam*, &c. And our late Law *French* doth corrupt the antient Law *French*, as that in thoſe primitive times was corrupted ſomewhat by the *Engliſh*: ſo that the moſt of our Law being in the ancient *French* (for ſo are the year Books until *Henry* the 7th his time incluſively) deſerveth no more to be ill thought on for the language (although not ſpoken in our or in any Country) than *Plautus* his Comedies becauſe they agree not with *Latine* Authors in their *Latine*, or *Chaucers* writings becauſe in words & ſtile they differ

Our Law French of later times much mingled.

differ ſo much from Sr. *Philip Sidneys* ſelected and exquiſite phraſe. Should any man think the worſe of the ſtudy of antiquity becauſe that moſt things wherewith they have dealt withal being Hiſtories of the middle and later age on this ſide *Chriſts* nativity, are written for the moſt part in very mean *Latine*. Neither is it any good objection to ſay that our tongue, wherein the Law is written, is no tongue, becauſe it is not ſpoken; for about *Charlemain* his time (as appears in *Lipſius* his epiſtles) the right *French* did more differ from, and ſeem more Barbarous in reſpect of the ſmoth-tongued now uſed in *France*, than our Law *French* about *Edward* the firſt his time did differ from the Natural *French* then in uſe; ſo as it was a tongue then much ſpoken, but now much varied and altered. Where it is objected that it is a tongue unknown certainly: It is by ſtudents of the Law, as eaſily, and far more eaſily learned than any other language can be; for within leſs than a ſevennights ſtudy it will be indifferently underſtood. And that it ſhould not be

The ſtudy of antiquity not to be miſliked for the ill *Latine*.

The ancient French more rude, than that now uſed.

be commonly underſtood of all men, there is great reaſon and no profit but peril in the contrary; (for if all men (whereof the greateſt number are of unquiet ſpirits) ſhould at the firſt ſight underſtand the language wherein our Laws are written, that would breed but ſmall reſt to them that would moſt deſire peace.) Therefore I cannot ſee what impeachment of credit it is to our Laws that they are written in ſuch a language, if of themſelves they are not to be diſcommended, which in the other points will ſomewhat appear.

Our Law *French* eaſily underſtood. Fit that the language wherein our Law is written ſhould not be commonly underſtood.

For the ſecond objection that our Laws want Method and order: For Method which indeed in all learning is to be wiſhed for, (and yet is not found or framed in our Laws) but that is no great diſgrace to the Laws, for hardly ſhall we find any faculty that is without any defect (as Sr. *Francis Bacon* in his ſecond Book of the advancement of learning hath well noted) whereas alſo there is not an harder point in Logick and Rhetorick, than the right diſtinguiſhing of the true Methodical parts in any fa-

2. The ſecond objection, that our Laws do want Method.

culty, as appears by the multitude of writers in each faculty. Indeed the Civil Law was easier for Students after such time as *Justinian* had digested the 2000 Books and 300000 verses, wherein it was scatered and confused? the like whereof might be wished in our Laws; but upon what grounds hoped for, I cannot yet discerne; for no small impediment therein would be, seeing our Laws are grounded so much upon reason, which alters and reforms other precedent errors. Hardly could there be a Methodical digest drawn of all the year Books (I mean for authority and not only for Study) which might be sure to stand always firm for Law, without it were first so determined by *Parliament*, the confirmation whereof I conceive would come *ad Calendas Græcas*.

Long, before the Civil Law was brought into Method.

The difficulty of digesting our Laws into a Method.

But for Study the time may come that by the example of *Littleton* for *Tenures*, and Common Law conveiances, and Estates; *Stanford* for the Crown pleas; *Theloal* for Writs; *Gregory* for Warranty, and few more heads; *Kitchin* for Courts; together with

A private Method for study, more easy and profitable.

with *Crompton*, and *Lambard*; ſo by their example, ſome great Lawyers may ſettle themſelves to imitation; this perchance may be remedied by ſome skilful *Scholaſtical* Lawyer, but whether the remedy would not be worſe than the diſeaſe, and whether it will not make any truants of ſuch as otherwiſe might prove painful Students, let it be their judgments who are judicial, and not theirs who are altogether ignorant in our Laws; for this is moſt to be feared; which we find by experience, that where abridgments are, and where by compendious Method ſome ſtrive to give life and luſter unto the Art they profeſs; the Students thereof coveting to come the next way to their Jornies end, do like thoſe Travellers which to avoid ſome long (though the ſafer) way, do chooſe to adventure the paſſage over a bridge, whoſe foundation may yet be faulty, & ſo fall ſhort of their Journey, rather than to go ſomewhat farther unto a ford where there is leſs danger and a ſurer, though ſomewhat a longer paſſage. I will not ſay that there is the like hazard in

What inconvenience might follow the digeſting of our Law into a preciſe Method.

Methodical compoſition of our anuals, or year Books of the Law, but ſure we ſee that many Students are already more addicted to the Study of the new than of the old year Books, wherein ſeeking to ſave pains ſome may fortune to find in the end, that to offer to go a nearer way than is to be found, is (as the proverb is) but the next way about; for though it be true that the laſt Judged Caſes are moſt in force, and the former many times abrogated, or altered, yet the old Caſes give grounds of Law unto the new, and by peruſing both, the differences of Reaſons which make the one firm and the other to fail are beſt diſcerned.

The peril, that Students deſire to read the new and to omit the old Books of our Law.

So that ſurely there is no humane ſcience which requireth more the revolution of old and new, the conference of Precedent and Subſequent matters, and in concluſion, that exacteth more the Study of the whole body of that ſcience, than doth the intire Study of the whole volumes of our Law, to make a man to be a perfect Lawyer: therefore whether this Compendious digeſting our Law into Method,

No Study requires more the reading of old and new Authors, than doth our Law.

Method, be profitable, neceſſary, or hurtful to the Students thereof; though, I muſt confeſs, I do much affect Method (as holding it a principal light of Learning) yet, as I ſaid before, I muſt leave the Cenſure thereof unto the Oracles of the Law. But if any man will be deſirous to follow a method in the Study of the Law, or a method for his Memory when he hath ſtudied it; he might, by diſtinguiſhing aright ſuch Alphabetical Titles as are diſperſed in *Fitzherbert*, *Brook* and *Statham*, their Abridgments, find, for his private ſtudies and uſe, a far more orderly and profitable form, than the reading of theſe Books according to *A B C*, do admit. Yet this, as the reſt, is ſpoken under correction of better Judgment.

Diſtinguiſhing of Alphabetical Titles, a help only for Memory.

Under this head of want of Method, is comprehended another objection which ſome make, and find fault withall; That our Pleaders uſe no Method, Eloquence, or Art in their Pleadings. If they mean the Pleadings which are entred in the Rolls, had they once tried ſome tickle

Another objection under this head againſt our Laws.

points of exception (as perchance others have done to their charge and peril) they would be of another opinion, and it may be then they would complain of the contrary; that in the rules and directions for *Defences*, *Traverſes*, *Confeſſions* and *Avoidances*, there are too nice differences and diſtinctions ſometimes exacted. If they intend the Pleading and Arguments at the Barr; it is true, that for Form they uſe neither *Ciceronian* Orations, nor *Syllogiſtical* Arguments in Mood and Figure; but yet, for matter, they do ſmell (as *Phocion* objected to *Demoſthenes* Orations) of the Candle, moſt commonly, in ſavouring of great pains taken, with exact quotation of Books and Judgments. Neither ſhould there be expected in ſuch Arguments elegant Forms of Speech, ſuch as ſhould tend to the commending or diſpraiſing of the parties (as the old Orators, *Iſocrates* and his ſucceſſors were wont;) And if any uſe this, as ſome do, a little of this Eloquence is too much. For Syllogiſms, indeed they uſe them not, neither are they needful in this Art,

Pleadings in Rolls and at the Bar, not *Ciceronian*, but diſtinct and ſignificant enough.

Eloquent invectives or inſinuations not fit for the pleaders of Law.

Art, or kind of Arguing, but as they are fitteſt for the Schools and Univerſities, ſo if there were need of them, there is no doubt but moſt of their Arguments or Pleadings at the Bar, might by Scholars be reduced into Syllogiſms, though then perchance the concurring reaſons of the Law might be made more intricate, and as hard to be underſtood as *Ariſtotles Acromantica*, eſpecially of ſuch as are not Logicians.

Syllogiſms fitteſt for the Univerſities and Schools.

Now to the laſt objection againſt our Laws, that they have not fundamental Maxims which are univerſally true, and that the Judges private opinions do uſually alter the Laws, and ſo leave it alwayes in uncertainty: For the firſt, concerning Maxims, or certain Foundations, which they ſuppoſe are not in our Laws; They which read and underſtand the Law ſhall find, that there are many received opinions and Rules in the Law, whereof ſcarce any contradiction hath been of Opinion, much leſs of Judgment; as amongſt the reſt, theſe of Inheritances.

The laſt objection againſt our Laws.

Many rules received in our Law without any contradiction.

1. That no land can by Inheritance lineally aſcend.

2. That the Heirs of the part of the Father are to be preferred before the Heirs of the part of the Mother.

3. That of Inheritances deſcended by the Mother, the Heirs of the part of the Father cannot inherit, and ſo of the other ſide.

With many other ſuch Rules infallible and unchangeable in the Law, whereof divers are collected by *Saint German* in his firſt book.

And the grounds or maxims are ſo certain concerning ſome of the nobleſt parts of the Law; (*viz.* about the Inheritances and Eſcheats) that the Lord Chief Juſtice *Coke* affirmeth (who is beſt able to prove his aſſertion) he found not in all the time he ſtudied the Law: *Ne duas quidem adverti quæſtiones, de jure hereditatum, de terrarum ligitima confiſcatione, ſive (ut loquantur) eſcaeta, aliiſque conſimilibus.* But howſoever this opinion ſtands, It is moſt ſure, that there are infinite other Rules and Poſitions in the Law, which admit no alteration or queſtion. To which

which it is uſually replied; It is true, that there are many ſuch Rules and Poſitions in the Common Law, which remain ſtill firm, and are not contradicted, yet they are not Maxims, nor deſerve not that title, as other Arts have, and are allowed them. The anſwer is, that theſe poſitive Rules which are certainly ſet down and determined for infallible, may, without any great errour, be intitled Maxims of the Law, or at leaſt, held in the nature of them (for authority, if not for method.) For in any Art, (as to inſtance in *Geometry*) let a propoſition or *theoreme* be once infallibly demonſtrated by principles; the Mathematician who made this demonſtration, upon infallible tokens of truth, may not unfitly call his demonſtration a *Maxime*, or Principle, in reſpect of authority, though not of method, as was ſpoken before: the like may be ſaid of our infallible poſitions and demonſtrations in the Common Law, whereof there are very many, howſoever ſome conceive the contrary.

That the poſitive rules of our law may be in ſome ſort reckoned as Maxims.

To ſhape ſome anſwer unto the laſt moſt

moſt uſual & effectual objection made againſt our Laws; that is, that the Judges private opinions and reaſon do uſually alter the Laws: and ſo it is left alwaies in a Labyrinth of uncertainty. Although my judgment in the Laws being ſo ſlender, is not ſufficient to anſwer ſo important an objection, tending ſo much to the diſgrace of our Laws, and indeed to the great ſcandal of the Juſtice of this Realm (the execution whereof dependeth moſt on theſe Judgments ſuppoſed to be ſo uncertain) yet I will be bold to ſpeak what I conceive, leaving the more full anſwer hereof to them that are much more deeply learned in our Laws.

How the Judges opinions may alter the Law.

Where they ſay that the alteration of the Laws doth depend on the Judges particular opinions and reaſon, whereby it is ſo much ſubject to mutability; ſure this is not altogether true, in ſuch ſence as it is ſpoken; for it is not the private opinion of one Judge that altereth the Law, but it is the concurring opinion of more than one, and that not only concurring in their private reaſon

and

and ſence as it is ſaid, but their reaſons are alwayes conferred with former Judgments, and either thereby ſtrengthened, or if differing from the ſame, they muſt ſhew reaſon alſo ſtronger or different from the former to ground their Judgments upon. And in this ſort that latter Judgments ſhould reverſe former, is not unuſual in other Laws, nor peculiar only to this of ours, for ſaith the Civil Law, *Non eſt novum ut priores leges ad poſteriores trahantur.* The Civil Law hath the like rule in another place, and the ſame hath a great Philoſopher, and a Learned Politician, *Non poſſunt omnes articuli ſingulatim aut legibus, aut Senatusconſultis comprehendi, ſed cum in aliqua cauſa ſententia eorum manifeſta eſt, is qui juriſdictioni præeſt, ad ſimilia procedere atque ita jus dicere debet.* In like manner concludeth a learned, and an ancient Eccleſiaſtical Writer, concerning the alteration of Laws upon good grounds of reaſon; He ſaith, *Ideo quia antiquiores leges ad poſteriores trahi uſitatum eſt; ſemper quaſi hoc legibus ineſſe credi oportet; ut ad*

That the Civil Law doth allow the alteration of Laws and of Judgments.

The opinion of a learned Father of the Church concerning the alteration of Laws.

ad eas quoque perſonas pertineant quæ quandoque ſimiles ſunt. But ſome will ſay, theſe are indeed rules for the alteration of Laws, upon different opinions and grounds of Reaſon; but have you any precedent that the Judges in other Laws do differ ſo much in their opinions, and do leave their Laws ſo uncertain? Yes ſurely, for in the Civil Law there are many Caſes of great conſequence, wherein the Doctors do differ in opinion, and ſhew each of them ſeveral reaſons and authorities to uphold their ſides and opinions, for they differ much upon the expoſition of the Rules of their Law, which are drawn, extended and reſtrain'd according to their ſeveral Opinions and Judgments; the reaſon is rendred, becauſe it is a very hard matter to expreſs all particulars by comprehenſion under a general head. But where it is ſaid, that the Law dependeth upon the variable reaſons of the Judges, that Reaſon ſhould be the ground both of the Law it ſelf, and of their Judgments upon the Law, is neither ſtrange nor unfit: for we con-

In the Civil Law the Doctors do much differ in Opinion.

confeſs that the Law is grounded upon tryed and well-examined Reaſon, which conſidereth what is convenient, and what is inconvenient; what is for the general good, and what for the particular; what doth concurr with the rigour of Juſtice, and what with the moderation of Equity; with many other conſiderable circumſtances, which Reaſon doth deliver, as well to the Law-maker, as to the Judge in expounding the Law. But yet the Judges do not wholly and only rely on the rules of Reaſon in delivering the Law (as the ſole prop and pillar thereof) although our Laws, as even the Laws of Nations, and all other particular and municipal Laws, are deduced from it: for *ratio eſt regula æquitatis*. And although the praiſe of the Law is, that the rules thereof are approved with reaſon (as the Touch-ſtone to try whether the remedy of an Inconvenience be good and ſound;) yet Reaſon in our Law is accompanied with other conſorts, and our Judges have other aids to ſupport and ſtrengthen their Judgments: being

thoſe

thoſe helps (which, as the Philoſopher ſaith) Reaſon doth uſe as her hand-maids, for the Invention and Knowledge of other Sciences and Arts, as Senſe, Obſervation, Experience and Induction: Of Senſe, to ſingle out Notions; of Obſervation, to keep many Notions together; of Experience, to confer theſe Notions which are neceſſary, and which not; and by Induction of many particulars concurring, to frame under few heads many general Concluſions. As other Sciences, and the perfect Profeſſors of them have theſe helps, ſo have our Law-makers the ſame in Ordaining, and our Judges in Expounding of the Laws. The firſt, which is Senſe, is common to all men, (even in all Mechanical Arts;) but the latter (as Obſervation, Experience and Induction) are chief inſtruments uſed and applyed by our Judges in the interpretation and expounding of our Laws: for after long ſtudy and practice of our Laws, after the reading and revolving of former Judgments, and of other ſtudious labours; they come to Experience and Ob-

What groun's the Judges do lay the Judgments upon.

Obſervation, out of which they frame concluſions for future Judgments, which muſt be ſtill like Judgments in like Caſes: for they may not, nor do not, ſo ſwerve from former Judgments, that they may contrary them, without there appear ſome manifeſt difference of Reaſon, which their reading concurring with Obſervation, and Experience, can beſt inform them of; and then upon different reaſons, (wherein the latter may correct ſome ſlips of the former) to give different Judgments, is neither ſtrange in our Law, unuſual in other Laws, or inconvenient in either. Therefore they which frame theſe objections of contrariety and uncertainty in the Judgments of our Common Law (perchance for the moſt part) do not conceive the Reaſon of thoſe things which they condemn ſo much: and in this they are not much to be believed, nor over much to be blamed, if Ignorance, and not Malice, be the Motive; when they ſpeak as they think, not as they know.

And

The accuſation of our Laws, becauſe they are not all written, nor certainly ſet down.

And for that many think (who think not much amiſs) that the chiefeſt defect of our Law is, becauſe it is not all written, or that it is not ſo written, that it is certain or ſure not to be changed. For the firſt, there is no other anſwer, as far as I can ſee, to be given, but that which was ſaid by a Writer of our Laws about three hundred years ſince: *Si ob ſcripturæ ſolummodo defectum, leges minime cenſentur; majoris proculdubio robur authoritatis, ipſis legibus videntur accommodare ſcripturæ, quàm vel ratio ſtatuentis vel decernentis æquitas. Leges vero & jura regni, ſcripto univerſaliter concludi noſtris temporibus, omnino quidem impoſſibile eſt, cùm propter ſcribentium ignorantiam, tum propter earum multitudinem confuſam.* It is confeſſed therefore, that they are not all written, and acknowledged, that it is impoſſible they ſhould be all written. And herein have we, for that part of the Common Law (which is generally called by that name) imitated the ancient *Druides* of this Land (but yet gone farther than they) who, following the *Pythago-*

Impoſſible that all the Law ſhould be written.

reans,

reans did not commit their Learning to Writing, or rather the *Lacedemonians*, who, by the inſtitution of *Licurgus*, held all Law not written, who, as *Plutarch* reporteth, *exiguos illos & pecuniarios contractus, quique propter uſum vitæ ſubinde immutantur, præſtare cenſebat ſcriptis legibus non comprehendi, neque immobilibus conſuetudinibus illigari: ſed permittendum ut pro ratione temporis augerentur, diminuerentúrve, ſecundum probe inſtitutorum hominum arbitrium*, yet our Law doth not give ſo much libertie to the *Judges*. But yet not onely *Politicians* and *Moraliſts*, but alſo the *Civil lawyers* do permit that in a Commonwealth the conſtitutions of *Princes* are to be interpreted according to the Judgment of Magiſtrates and Judges, ſometimes mitigated, and, according to incident diverſities, interpreted, which cannot be alwaies committed to writing: for it cannot be alwaies the ſame, and this were rather to be wiſhed than to be hóped for in our Laws: and I would that he which finds this fault, could finde a remedie and preſcribe the re-

formation. Controverſies and ambiguities are ſo frequent not onely in this, but in all ſciences, arts and profeſſions, that every day new particulars are ſubjects of new queſtions, eſpecially in the Laws, which ſpring out of the intricate forms of new Conveyances, and ſuch like invention of men. And ſo long as man ſeeth but in *ænigmate* and *per ſpeculum* (as the *Divines* ſay of the Knowledg of God) and ſo long as by the rules of the perſpectives, that which is ſeen by reflection, or refraction, is never ſeen in, or according to, his true place; ſo long and in ſuch ſort we muſt look for controverſies and ambiguities in all profeſſions, which are indeed not ſo much, or ſo ſenſibly felt, in any art as in the Law; becauſe none other goeth ſo near mens inward thoughts and conceipts as ſuch doe whereon their eſtates and poſſeſſions are adventured, therefore loſers may have leave to ſpeak, but not unmuch.

New particulars breed new queſtions.

How uncertain man's knowledg is in Divine things and in other ſciences.

Nothing goeth ſo near to mens thoughts as their loſs of eſtate.

CHAP.

CHAP. V.

Of the Books written of the Laws of England, *whereby the Knowledge thereof is chiefly obtained.*

THE chief Knowledg (by ſtudy) of our Law doth conſiſt in the Works of them which have written of the Law, and they are of 3 ſorts. Three ſorts of writers of our Law.

1. The firſt whereof ſetteth down the Art and Rules of the ſame in a certain method, ſuch as is, *Glanvill*, *Bracton* and *Britton*, who are ancient Authors, wrote in *Latine* and did indeavour to reduce thoſe Rules according to the titles of the *Civil-lawes*, but moſt eſpecially *Bracton*: though theſe are ancient Authors, yet they are now cited rather for ornament than for authoritie.

2. Others have written of the Precedents, Rules and Natures of Writs, which do lay the ground of every Action to procure judgment and execution thereon, as the books of *Entries* with the Regiſter, and the two *books* grounded thereupon. Writers of the Nature and Precedents of Writs.

In this *Fitz-herbert* hath deſerved ſpecially well.

Reporters of former Judged Cases.

3. A third ſort of Writers of our Law there are, which be thoſe who write the particular and ſummary Caſes that have received Determination and Sentence in the King's jucicial Courts, ſhewing how the Rules of Law were applied to thoſe Caſes, or rather how theſe Caſes were reduced to the Rules of Law both by the *Counſellors* that argued the ſame on both ſides, with probable Reaſons confirming their opinions with authorities of former Judgments, and alſo the *Judges* concluding their Sentences upon the ſame by the common ſquare of Reaſon and Rules they have learned of the foregoing learned *Judges*. Of this latter ſort of Writers called Reporters, who they were that compiled the firſt and moſt antient Books of Reports is not certain, for we have not their Names, but ſince the time of King *Edward the third*, there are ſome Works and Reports written of every King's Raign: for before his time we have not any *Volume* at large

It is not known who compiled the firſt Annales and ancient Year-books.

large now left, and if any ſuch were, they are conſumed through the injury of times, or neglect, or malice, of ſuch in whoſe cuſtody they remained: yet it ſhould ſeem, that in the raign of *King Henry* the 8. there were ſome more ancient Books or Reports of the Law Caſes extant reported in the times of *King Henry* the 3. and *Edward* the firſt, and *Edw.* the ſecond; for that *Fitz-herbert* who did reduce all the Caſes of the Reports that were extant in his time under certain general Heads, and *Brook* likewiſe, who a little after him, did ſet forth another Abridgement of the Law, and Caſes extant in his time, (adding more general Heads than *Fitz-herbert* had done) yet both of them under divers of their titles abridge the pith of ſundry Caſes argued, and moſt of them adjudged in thoſe Kings raigns. Howbeit the Volumes at large are not † now extant.

Divers antient Yearbooks wanting.

Some Caſes abridged of the Books now not extant.

† We have now E. 2. and R. 2. What Yearbooks are yet extant.

But of the Caſes which were adjudged in the time of King *Edw.* the third, there are four Volumes now extant. *Of King* Richard *the ſe-*

eond his time, there are not any Volumes, but many Caſes abridged as aforeſaid. Of the times *of King* Henry *the fourth and King* Henry *the fifth there is no Volume.* Of King *Henry* the ſixt there are two great Volumes. Of King *Edw.* the fourth one Volume. One Volume of King *Henry* the ſeventh, in the later end of whoſe raign the Reports do diſcontinue until the twelfth year of King *Henry* the eight. And then they were recontinued untill the nineteenth of *Henry* the eight, from thence again diſcontinued till the twenty ſixt of *Henry* the eight; at which time they were held on for two years, that is, twenty ſixt and twenty ſeventh of *Henry* the eight: which are the laſt Reports which we have, ſave ſuch as ſince have been revived by three or four worthy men, whoſe private and voluntary diligence have for the publick good continued ſundry Reports, ſuch as Mr. *Kellaway* who reported privately certain Caſes in King *Henry* the ſeventh his time. This Book and labour is now come to light by

Long quinto.

by Mr. Juſtice *Crooke* his Care and Charge. Alſo Mr. *Brooke* who did report diverſe memorable Caſes which happened when he was making of his Abridgment in the time of King *Henry* the eighth, King *Edward* the ſixth, and Queene *Mary*, reported them under apt titles in his Abridgement.

Of the late Reports of judged Caſes.

Then, my Lord *Dyer*, who, when he was a Student, a Practicioner and a Judge, obſerved many famous Caſes which were publiſhed ſince his death.

A little after him began Mr. *Ploden*, who reported the ſpeciall Caſes which hapned from the ſecond of King *Edw.* the ſixt until the fifteenth of Queen *Elizabeth*; they are but few Caſes, yet more fully reported than any before him.

Then, the voluntary Reporter is the late Lord *Coke*, who hath ſet forth thirteen Volumes of Reports. [Since that we have had *Hobart*, *Bulſtrod*, *Hutton*, and divers others, eſpecially Juſtice *Croke*, who continues his Reports till the middle of the reign of King *Charles* the firſt.]

Writers of Rules, and the application of them to Caſes.

There are beſides theſe Reporters ſome other Writers of the Common Law, whoſe Works are mixt partly of Rules and partly of Application of them to certain Caſes of their own knowledg and collection: ſuch is the Book called, *The old Tenures*; and another commonly called *Littleton's Tenures*. This Book ſerveth for an Introduction to the young Students in the Common-law of *England*, as *Juſtinian's* Inſtitutions doth for the beginners in the Civill-law. Mr. *Perkins* did likewiſe draw certain Rules and Caſes of ſome Titles of the Common law into a method, but not of equall, or like, authoritie with *Littleton's*. It is alledged by *Ploden*, in his Epiſtle, that in antient time, (as he had upon credit heard) there were four Reporters of our Caſes of Law which were chief men, and had a yearly Stipend for their travell therein paid by the Kings of this Realm, and they conferred together at the making and ſetting forth of the Reports. It were to be wiſhed that there were the like courſe ſtill continued, and allowance given:

Reporters of the Law in former times authorized and allowed by the King.

given: So ſhould we not have been bereaved of ſo many worthy and unrecoverable Caſes and Judgments which are wanting, and no doubt either periſhed, or buried in ſilence, by which means the Students are deprived of the Lights and Helps which they might have thereby.

CHAP. VI.

Of Eſtates allowed by the Law of England.

HAving ſaid ſomewhat of the Grounds of our Common-law of *England*, it ſhould ſeem proper in the next place, to ſhew the Eſtates which the Common-law doth allow. And that briefly; for neither my Judgment in the Laws nor this place will fitly allow ſuch a perfect and exact Diſcourſe as may paſs without exception of the Learned in our Laws, or fully ſatisfie ſuch as are well experienced in the ſame. Onely that which ſhall be ſaid is rather ſet down as a general view, to conſider the ſtate and courſe

courſe of our Laws; than as a platform and preciſe inſtruction thereof.

Fee-ſimple of two ſorts.

The Eſtates moſt abſolute which the law doth allow, are either Fee-ſimple abſolute of Land to a man and to his heirs and aſſignes for ever: or Fee-ſimple conditional, that is, to him and the heires of his body general or ſpecial, as it was at the Common-law which is accompted Fee-taile to his Heirs males or females, according to the particular limitation.

Eſtate of Fee-ſimple conditional now made an Eſtate in Fee-taile.

How times have altered the ſtate of Fee-ſimple.

This Eſtate of Fee-ſimple abſolute and general is as ancient as our Common-law, and perchance before the uſe of our Common-laws as they are now in ure; for from the beginning there was giving and granting of Lands, though not altogether in that exact and expreſs form which later times have required: becauſe at the

1. firſt if one man had given Lands to another for ever, this had been held a ſufficient grant to him, and to his

2. heires. But now the law hath ſo expounded and diſtinguiſhed, that if the word [Heirs] be not in the grant, it is no Fee-ſimple, but an eſtate for life.

3. The eſtate in Fee-ſimple donditional

was

was likewiſe (for the general practice thereof) introduced upon later conſiderations, of which at the firſt there was no recovery left in the Giver, nor remainder could be limited over (but after iſſue had, which was the condition annexed) the Donee, or he to whom the Gift was made, had power to aliene the whole Land and Eſtate.

But afterwards this Eſtate in Fee- 4.
ſimple conditional was in the thirteenth year of King *Edw.* the firſt by a Statute made an Eſtate in tayle in the Donee, and a Reverſion in the Donor or giver. And then the Donee might not by any Act barr his iſſues, neither by forfeiture of offence, as Treaſon, nor by conveiance, though never ſo ſtrong, as Fine, &c.

Thus we ſee how the greateſt and moſt beneficial Eſtate of Fee-ſimple, which the Common-law doth admit, hath received his degrees, his limitation, and alteration according as time, increaſe of knowledg in the Laws, and of Conveyances and Aſſurances amongſt men have thought it meet: the like alterations we may finde

finde in other Eſtates of leaſt extent, and benefit in the Laws.

Where mention was firſt made of the ſtate of Fee-ſimple to be very antient, though not always in one expreſſe form; It is true, with a ſeveral reſpect of times in antiquitie. For among the *Saxons* Fee-ſimple was, and that by the name of Land to a man and his heires, as it appeareth in the *Saxon Laws* of *Alfred*, where it is ſaid, *qui terram habuerit per ſcripturæ ſeriem* (the Saxon word is *boclande*) *ſibi relictam ab hæredibus ad alios alienandi poteſtas ei non eſto, ſiquidem præſentibus cognatis coram rege aut epiſcopo ſcriptura aut teſtimonio potentum, omni alienatione & interdixiſſe illum qui prius conceſſit, talemque ei impoſuiſſe legem cum primo dederit:* out of which may be noted, both the Fee-ſimple abſolute and conditional were then allowed, and in uſe. And alſo a man may ſee that in antient time how a gift to a man and his heires and a gift to a man for ever were all one. For when Erle *Godwine* came to the Biſhop of *Canterbury* to get the mannor of *Boſcham* in *Suſſex*; he firſt

Fee-ſimple in uſe in the *Saxons* time.

Fee-ſimple conditional alſo known in the *Saxons* time.

firſt jeſtingly ſaid to him (as Mr. *Camden* ſaith out of *Mapæus*) *Da mihi Boſeham.* The Biſhop (as it ſhould ſeem, ſcarcely knowing his meaning) anſwered him, *Do tibi Boſeham*: whereupon without any more livery, the Erle took and had poſſeſſion thereof to him and to his heirs; by which alſo we may ſee two things, that the word *heirs*, was not then of abſolute neceſſitie in a grant to create a Fee-ſimple, and that then ſuch ſtrict words and forms of Conveyances were not required, as of later times, to paſſe Eſtates of Lands.

There are other Eſtates of inferior degree and dignity allowed by the Common-law; whereof ſome are accompted Inheritances and Free-hold; Others but uncertain, and not for a prefixed ſeaſon or term.

Of the firſt ſort is an Eſtate for life, and that two-fold, either created by the party, as by Leaſe, &c. or elſe created by the Law, as Tenant by the Curteſie of *England*, (by having iſſue of a wife Inheritrix;) or elſe an Eſtate in Dower limited to a wife in mariage, and this reckoned Free-hold, for

Eſtates for life two-fold.

for that it is an Eſtate for life.

Eſtates for years by grant.

An Eſtate for years by grant of the partie, is, when by Leaſe either in writing or word, called a Leaſe parol, or by Will, ſuch an Eſtate is granted.

Eſtates for years by the Law.

An Eſtate for years by Law is divers, as that which the Lord or *Guardian* hath till his Ward be of full age: the like by *Elegit* grounded upon a Statute *Ed.*1. upon a recovery of *Debt*, *Treſpaſſe* or *Acknowledgment* of Debt in the Chancerie or before a Judge.

The like Eſtate for years by Law, is by the *Statute merchant* or *ſtaple*. By acknowledging a debt before the Major of the *Staple* of antient *Cities* and ſome ſpecial merchandizing Towns.

The two laſt Eſtates for years created by the Law were ordained for the better recovery and aſſurance of due debts; but whether they, or that of a Guardian, be Eſtates for lives by Law ſome make queſtion.

Tenant by Copie of Court-roll firſt reckoned Tenants at will: But now not ſo.

There are two other Eſtates whereof the Holders are called Tenans at Will; but of them (although they be ſo termed) the firſt is now allowed for

for a more ample Eſtate, by uſe and *Continuance*, that is to ſay, Tenant by Copie of Court-roll, firſt called, *Tenant in Vilainage*. But now according to the Cuſtome of *Mannors*, theſe Tenants are not to be altered, but may renew their Eſtates by common courſe.

The other, which is the laſt, the leaſt and meaneſt Eſtate that the Law alloweth, is called, *Tenant at will*, who hath no longer term than ſtandeth with the will and pleaſure of the *Landlord*.

Tenant at will the meaneſt Eſtate the Law alloweth of.

CHAP. VII.

Of Aſſurances and Conveyances which grow out of theſe Eſtates by the Common-law.

SInce we ſee that the Eſtates and Intereſts of Men cannot paſs from one unto another, but by Deſcent or by Conveyance; It were not amiſs to manifeſt the general courſe of Aſſurances which are uſual, and admitted by the Common-laws of this Realm. Theſe Eſtates have for the moſt part their paſſages by *Feoffment*, by *Deed*, by

by *Fine* and *Releaſe*, by *Common-recovery*, by *Wills* and by *Uſes*.

Feoffment.

Feoffment is by *Liverie* and *Seiſin*, that is, by deliverie of Poſſeſſion upon the Land, by taking of *turfe and twigg* (but in antient time, as *Bracton lib.* 2. ſheweth, when there was no Houſe on the Land, it was heretofore *per fuſtim & per baculum*;) and this *Livery*, by *Bracton*, is called, *Veſtimentum donationis*, thereby putting the party to whom the Eſtate is granted in poſſeſſion, or ſome other to his uſe by Letter of *Attorney*. And though this be of the Poſſeſſion only; yet without *Liverie* and *Seiſin* no *Feoffment* can receive life or force.

How it was executed in antient time.

A *Feoffment* is proper to an Eſtate for life at the leaſt, and ſo upwards, or elſe by grant of the Reverſion and Attornament of the particular Tenant, which muſt be by Deed: becauſe the poſſeſſion paſſeth not by delivery only. This Conveyance was antient and moſt of Force, being notorious, of which the Country might take notice, and is much uſed at this day.

A *Feoffment* proper to an Eſtate for life at the leaſt.

Exchange of Land whereby one parcel

Exchang of lands.

parcel of Land is exchanged for an other of equall eſtate, heretofore much uſed but not now.

Grants by Deeds written in paper or parchment ſealed and delivered with theſe words, *Dedi & conceſſi*, &c. have been antient and moſt uſual, ſo is it yet uſed; but not ſo frequent, eſpecially in Eſtates of any value. Graunts by Deeds with *Dedi & conceſſi*.

An other Aſſurance there is by Fine, which alſo is antient: at the firſt it was the agreement of parties upon *Arbitrement* or otherwiſe after a Controverſie ariſen, when an Action is brought and hanging, for ſo is the ancient Law after *H.* 3. his time, for before, and then, Fines were received of many ſuch things and in ſuch ſort as will not be now admitted. So was it ſet down betwixt them in theſe words; *Hæc eſt finalis concordia*, that is, That this is the final agreement betwixt ſuch and ſuch perſons. Therefore, as ſome ſay, it was called, *finis, quia finem imponit litibus*, becauſe it maketh an end of ſtrife. This Conveyance is moſt antient, as ſome hold it, before the *Conqueſt*; but now uſed in the King's Court of *Common pleas*,

and principally in ſome Courts of *Record*, to make the Aſſurance more forcible and certain.

Fines ſtrengthned by Statute.

The ſame by a Statute made in the 18th year of *Edw.* 1. was ſtrengthened; and by the ſame Statute every perſon of full age, of ſound minde, out of priſon, and within the Realm, were bound and concluded by a Fine, if they did not make Claim within a year and a day after the Fine levied. But this Statute being thought too penal and prejudicial to Mens rights was repelled by another Statute in the four and thirtieth year of King *Edward* the third: And then men were at liberty, as before, to make their Claim at any time.

Former Statutes concerning Fines repealed.

But afterwards this Satute of 34 *Edw.* 3. was alſo repealed by a Statute in the fourth year of King *H.*7. and alſo by a Statute in the 32 *H.*8. Fines were made ſo ſtrong, that after the Fine ingroſſed, and Proclamation made, all perſons after 5 years Non-claim were bound, unleſs they were under age, lunatick, in priſon, or out of the Land at the time of the Fine levied.

And

And by this Statute of 32 *H.* 8. Tenant in tail may barr his iſſue, which before he could not, by reaſon the Statute of 13 *Edwardi* 1. provided he ſhould not binde him by any act.

Common-recoverie an Undoer of former Conveyances.

Another Conveyance there is now much in uſe, yet not very antient, which may be called a *Pick-lock* or an Undoer of former Aſſurances: This is called a *Common-recovery*, and was never uſed till about the 12 year of *Ed.* the 4. it is not warranted by any Statute, but an Invention firſt grounded upon a mere Conceipt, now held the ſtrongeſt Conveyance.

The fraudulent invention of *Common-recoveries.*

The Invention was, that the Iſſue in tail, or he in the Reverſion or Remainder upon a tail ſhould be barred of his Right and Eſtate by a recovery againſt the Tenant in tail: wherein Tenant in tail upon a ſuppoſed Warrantie did vouch an eſtranger, becauſe the Iſſue or he in the Reverſion by this voucher was ſuppoſed to have a recompence in ſatisfaction of his Eſtate, which being not ſo indeed, this is then but a mere Colluſion, and indeed the moſt injurious Conveyance that the Law doth allow of to cut

off mens titles and poſſibilities without their privitie or ſatisfaction. This Conveyance is uſed only to cut off the Reverſion or Remainder depending upon an Eſtate-tayle, and to deſtroy *perpetuities* which no other Conveyance doth, as a Fine is uſed to barr eſtrangers that pretend right of Poſſeſſion or Action, which no other Conveyance can doe.

Conveyance of Land by Will, how it ſtood at firſt.

Conveyance of Land by Will or laſt Teſtament in antient time was only in ſuch antient *Cities* and *Boroughs* which ſpecially preſcribed for the ſame, and that the Lands were deviſable by Cuſtome. But the greateſt part of the Land within this Realm was not ſubject to this kind of Conveyance, unleſs the ſame Land were firſt granted over to Uſes or in Truſt; and then the ſaid Truſt was deviſable by Will, becauſe it was a matter in Conſcience; and a *Subpœna* in *Chancery* was the only remedy.

But in the 27 year of King *H.* 8. all thoſe Uſes were transferred into Poſſeſſions; ſo that by means thereof no Land, by any means was deviſeable

viſeable but Cuſtomary-lands untill the 32 and 34 years of King *H.* 8. when it was Enacted that all Lands might be deviſed by Will, and if the ſame were held in Socage tenure, the whole paſſeth by Will. But if of the King in Chief or of a Subject by Knight-ſervice, two parts only do paſs by Will, and the King, or Lord, of whom it is holden, is to have a third part during the nonage of the Heir, and the Heir the ſaid third part afterwards.

Farther liberty granted by ſtatute to convey Lands by Will.

The Conveyance by Uſes was in antient time unknown, and began in the time of the Civil-warrs of *Ed.* 2. againſt the Barons, and of *Lancaſter* and *York*, bred and begotten by fear; for the *owners* of Lands doubting leſt themſelves by partaking ſhould be attainted (and ſo their livings forfeited) did convey their Lands over to their Friends in truſt, but received the profits themſelves: which perception or propertie by Law was called Uſe. And the party who was Owner in Conſcience was called *Ceſtuy a que uſe*, or *pernor* of the profits. Alſo afterwards Uſes were invented

Conveyance by Uſes, when and how it begun.

by fraud to deceive Creditors of their Debts, Purchaſers of their Bargains, and Men that had right of their Actions; all which was remedied by the Statute of the 27 of *H.* 8. whereby the Poſſeſſion of the parties truſted was transferred to the *Ceſtuy a que uſe*, and the Uſe and Poſſeſſion were incorporated and united. But yet at this day Conveyance by Uſe is very common, and many kindes of Conveyances are lately ſprung up out of this Statute of 27 of *H.* 8. as Bargains and Sales for money. But this muſt be enrolled within ſix monthes by the Statute of 27 *H.* 8.

CHAP.

CHAP. VIII.

Of Actions and of their Trials according to the Common-laws of England.

IT is a ſaying both in the Civil-laws and Common-laws of this Kingdome, that Actions whereupon the Trials of Suits betwixt party and party do depend, are of three ſorts; either *real*, *perſonal*, or *mixt*. The firſt concerneth the Title of man's Lands and Freeholds; the ſecond of their Goods and Chattells; and the third are in *Rem & perſonam ſimul*, as Waſte, *Quare impedit*, *Ejectione*, and the like. Actions of 3 ſorts.

Actions heretofore uſed for real matters were Aſſiſes, Writts of Entry and Writts of Right for Fee-ſimple, and as ſome hold for Fee-tail, confirmed by Precedents of experience, alſo Formedon for Fee-taile, *Cui in vita*, for a Woman upon the diſcontinuance of her Inheritance by her husband. Actions real.

And for perſonal Matters and Actions perſonal.

Contracts it was, as at this day: which real Actions were ſo uſed, becauſe the partie oftentimes was barred of his Entry by a diſcent, that if one did diſſeiſe or unlawfully diſpoſſeſs another of any Land, and the Diſſeiſor or Wrong-doer died thereof ſeiſed, the lawfull Heir, or he that had the Right, might not put the other out of poſſeſſion or enter for his Right, but ought to ſue firſt for it.

The moſt uſual Trial of Actions real at this day.

But by the Statute of 32 of *H.* 8. no diſcent to take away an Entry may be without five years peaceable poſſeſſion. And therefore now to bring ſuch Titles to trial, the uſe is either to enter and bring an Action of treſpaſs, and thereby to try the Title, or to diſtrein ſome Cattel upon the ground, and upon a Replevin to avow a dammage Feſant, that by affirming the Cattell hath treſpaſſed his ground, the intereſt thereof may thereby be tryed; but the common courſe is to ſeale a Leaſe upon the Land, and ſo to try it by an Action of *Ejectione firmæ.*

Few real Actions now uſed, being full of delay.

At this day few real Actions are uſed, becauſe they are more full of delay,

delay, and alſo they are more peremptory and binding againſt the party: for a former Recovery was a good Plea, but in theſe perſonal Actions it is not, for in them the party may bring as many Actions as his purſe will maintain.

Alſo Actions upon the Caſe for Words are very common.

Actions upon the Caſe are common.

CHAP.

CHAP. IX.

Of Trials allowed by the Laws of England.

AS it is uſual amongſt men to commence Suits and Actions, ſo it is of neceſſity that ſome certain Form ſhould be preſcribed, by which thoſe Variances, Suits and Actions ſhould be brought to Concluſion: ſo hath the Laws of this Land, and Wiſdome of the Law-makers, found out two wayes for the Trial of Suits, which is either by Jury upon the Oaths and Verdict of twelve Free-holders, or elſe by Battaile between the parties (but this is out of uſe) or their Champions, or by the Oath of the defendant which is called, Ley Gager.

Two ways for the Trial of Suits and Variances.

Some have conceitedly ſaid, that the Trials (except Battaile) have conſiſted upon the number of twelve with a triple diſtinction, as twelve Judges for matter in Law, twelve Jurors, and twelve in Wager of Law, for ſo is the form.

A conceited opinion of Trials.

There

There is a Trial alſo by the Certificate of the Biſhop for Baſtardy and Mariage; alſo of Infancie, by Inſpection of the Court; alſo of Villanage, by his Kinsfolks; alſo Death of the Husband by proofs in Dower. But theſe (eſpecially the latter of theſe) are not ſo much in uſe though allowed by our Laws.

Trial by Certificate of the Biſhop, &c.

Of which Trials, although Trial by Battaile being antiently uſed, and is not yet aboliſhed by any Statute, yet by reaſon of the unchriſtian and bloody proceedings thereof, (when the ſtrongeſt Hand and Heart may overcome the beſt Right, and loſſe of Living is determined with loſſe of Life,) it is therefore obſoleted, and grown out of uſe. Such Trial by Battaile was appointed to be in Tuttle-Field in the 13 *Eliz.* where the Champions, Liſts, Judges, and all being prepared, the Demandant was non-ſuite, and ſo that Trial ceaſed: And another was appointed in the ſame place about the 8 of King *Charles* 1. but it was taken up and ſo ended. This Trial was both in civil and criminal Pleas. In civil Pleas it

Trial by Battaile not aboliſhed, nor lately uſed.

it was only in a Writt of right by Champions; in criminal Pleas it was in an appeal of Death by the parties.

A Trial termed Battail but by Writ.

*B*attaile is alſo termed a Trial in a Writ of right, of Advouſon and *Rationabilibus diviſis*, and other Writs which concern the Right only; as *Fitz-herbert* witneſſeth: and alſo in civil Cauſes the Defendant might ſometimes wage Battle himſelf, as *Glanvil* ſaith, *lib.* 2. *Cap* 3.

Trials by Oath.

Trial by Oath is (as heretofore) uſed by wager of Law upon Contracts without ſpecialtie in an Action of Debt.

This trial about *Edw.* 3. and *Edw.* 2. time was uſed in Actions which began *ex maleficio*: as in contracts *ex ſtipulatione*; for in Treſpaſſes it hath been uſed, as divers authorities are in the Year-books: But yet of late by reaſon mens Conſciences were found to be large and foul, whereby the Oath of a perjured perſon for his owne profit might much prejudice an honeſt Man, the Trial by Oath is much prevented, by turning the formerly uſed Action of Debt into an Action upon the Caſe, wherein no Wager of Law lyeth.

Trial by Oath is much prevented.

The

The moſt common and proper Tryal of Suits in this Kingdom (heretofore and now in force) is by Jury, that is, by Oath and Verdict of twelve Freeholders, both in Actions reals for Lands, and Actions perſonals for Contracts and Treſpaſſes. In this Trial, the Jury is not tied only to the Evidence of two men or of more Witneſſes, but may find *Veritatem facti* upon Circumſtances, or by Witneſſes, or ſometimes (eſpecially for want of manifeſt or probable Evidence) upon their own Knowledges: And in Caſes doubtfull concerning points of Law the Judges are to deliver *Veritatem Juris.*

Trial by Jury moſt frequent and in force.

If the Jury erre in their Verdict, an Attaint lyeth againſt them, wherein the matter muſt be tried by 24 ſufficient and ſubſtantial Jurors, and that to be final. If it be found by them that the former Jury hath given a falſe Verdict and were forſworn, the party wronged is to be reſtored to his Right, and the firſt Jury grievouſly puniſhed by the Common-law, which puniſhment is mitigated by the Statute of 23 *H.* 8.

Attaint of a Jury erring.

If

Error of Judgement how reformed.

If upon any Action or Suite commenced, the Judges do erre in Judgement in any Court of Record, or that the ſame be ſuppoſed; A Writt of Error lyeth before other Judges ſuperiors. If in the Exchequer, it lyeth in the Exchequer Chamber by the Statute of 31 *E.* 3 Cap. 12. If in the Common-pleas or Chancery in Latine proceedings it lyeth in the Kings-bench; If in the Kings-bench, heretofore it lay only in Parliament, but now by the Statute of 27 *Eliz.* in the Exchequer-chamber before the Juſtices of the Common-pleas and Barons of the Exchequer.

CHAP.

CHAP. X.

Of ſome things in the Miniſters and Proceedings of our Laws conceived worthy to be reformed.

BEcauſe there are divers who do complain much againſt our Laws, whereof I may be bold to ſay that many (if not the moſt part) do not rightly diſtinguiſh betwixt the Uſe and the Abuſe of our Laws, or betwixt the Laws themſelves, and the ill Practice and Proceedings of ſome corrupt perſons in the handling and trial of them; and for that I have formerly made ſome Apologie for our Laws in anſwer of theſe accuſations: I hold it as fit in plain and ſincere dealing to deliver what defects, or other indirect proceedings I do conceive there are practiſed in the Trials of Suits, tending to the delay, overburdening, and deluding of the Subjects in their Suits, or to the defrauding of the Law it ſelf in the withdrawing or declining of it from its natural pure and upright Courſe:

The Uſe and Abuſe of our Laws not well diſtinguiſhed by ſome.

The Authors intention.

Courſe: which I ſhall ſet down by way of ſuppoſition (only as farr as I can conceive) rather than of any peremptory poſition. And in the ſame ſence have I ſpoken all the reſt; allwayes ſubmitting the ſame unto deeper Judgement of them that are learned in our Laws.

Defects of 2 ſorts, that is in Trials & Proceedings of the Law.

The Defects whereof I ſpake before are of two ſorts, Defects in Trials, and Defects in the Proceedings of our Law. The firſt whereof, as I conceive, proceedeth ſpecially from two cauſes, want of underſtanding or indifferency in Jurors who trie, want of Integritie in Judges who direct Jurors much in matter of Fact and have the whole power in deciding points of Law.

Want of underſtanding in Jurors.

Touching the former, whereby in courſe the Verdict of Juries, the Rights, Inheritances, & whole Eſtates of moſt of the Subjects within the Kingdome are either tryed or ſubject to be tryed; and yet in many places the Jurors (for the moſt part) are found to be ſimple, of mean capacitie, and of as ſmall ſubſtance in Eſtate: for either no better are impannelled,

pannelled, or if better be, they of beſt Abilitie and Judgement, do abſent themſelves; preſuming that either by ſome excuſe made for them, or by ſome other means, they may be diſpenced withall, or, if this ſerve not, the worſt is but to pay ſome ſmall Fine: So uſually the Service is impoſed on them that are leaſt able to diſcharge it: Sometimes to the no ſmall prejudice of mens Rights; wherein it were to be wiſhed, that either by ſome farther Laws (or at the leaſt by better Execution of the former Laws) Sheriffs were compelled to impannell in Juries none but men able for Judgement and Subſtance; And, that ſuch being impannell'd, a more ſtrict Courſe were taken by the Juſtices for their better appearance and attendance without any kind of diſpenſation or connivence. Care hath been taken to remedie this by the Statute made 16 and 17 Car. 2. 3.

Sheriffs to be compelled to impannell able men in Juries.

No diſpenſation with Jury men to be permitted.

Alſo another abuſe there is concerning the impannelling of Jurors worthy of reformation, which is, That the Jurors of the principal pannel

ſeldome appearing full, it is found an uſual practice for the Plaintiff to requeſt Free-holders (his friends) to ſtand ready within view of th Court, to be put into the Tales; therefore to avoid this miſchief it were neceſſary to have a ſpecial Oath always adminiſtred unto the Jurors, thus added, That they are not requeſted by either partie or laboured by any for them. It ſhould ſeem that the like Oath were needfull to be given unto the Sheriff or ſome ſevere penaltie appointed againſt the impannelling of Jurors at the nomination of the parties or their freinds, whereby many men have received great hurt and prejudice. Alſo it may be held as requiſite that the Jurors had a more ſpecial and particular Oath when they are ſummoned, and do appear (but before they are ſworn of the Jurie,) to know whether they have been foreſtalled by Informations or Perſuaſions, as well as that they will give their Verdict without any particular reſpects to either ſide; for it is like they will make more conſcience, being

Free-holders deſired to ſtand in view that they may be returned of the Jury.

The Sheriff and the Jury to have a more ſpeciall Oath.

ing examined upon their Oath before they come to the Trial than after, when they have ſuddenly ſwallowed the Oath without publick examination of the Juſtices upon Oath, or particular and private of their own Conſciences by this Oath: And although there is good proviſion already taken by our Law, that exception and chalenge may be taken upon reaſonable and juſt cauſes allowed by the Law, yet ſince this cannot be certainly known, who is laboured and dealt withall before-hand, but by the examination of a mans conſcience upon a mans own Oath; I am perſwaded that this would prevent many corruptions in Trials by Juries; whereunto the nature of man is ſubject to be drawn, by ſolicitation of friends, promiſe of reward, or fear of diſpleaſure. And it would take away the ſcandal layed upon the Trial of Juries, which as it is different from the courſe of other Laws, ſo being well looked to by theſe and the like cautions, there is no doubt but it is a moſt excellent kind of Trial, eſpecially in matters

of Fact whereunto it is principally applied; and being thus exactly executed, I will be bold to ſay, that it excells the Trialls of all other Laws, and is one of the worthieſt parts of proceedings in our law, whatſoever ſome Calumniators have ſaid to the contrary, whereof he that ſhall deſire to be farther ſatisfied, may find it fully demonſtrated in that noble and learned Chancellor of *England Forteſcue* his Book.

Touching the other point where-
Touching the Judges ſinceritie.
in there may be ſome prejudice in the Trials of Suits for want of ſinceritie in the Judges, although there are at this time as reverend, upright, and learned Judges, as hath been at any time within this kingdome: yet that amongſt them there have been always ſome who might be ſometimes led by affection or by ſome other private reſpects, may not be denied: unleſs we ſhould think, that they all and every of them, had more priviledge of not erring, or of not affecting, liking or diſliking, than either any other Judges or men of any other profeſſion in the world

are

are induced withall: Therefore as a great Prince was content (nay did command) that every day one ſhould come into his Chamber, and put him in mind of his eſtate, and to tell him theſe words: *Remember that thou art a mortal Man.* In like ſort it is a thing fit to be conſidered, whether it were not convenient, that the Judges every Term and at every Aſſiſe, or at leaſt once every year, ſhould publickly in Court and in open audience of the people take an Oath, That they have not received, nor will receive any gift or reward, or promiſe of reward, for their favour, in any Cauſe heard or to be heard before them; nor will for favour, fear, or affection, incline to either partie, otherwiſe than as the very truth of the matter ſhall move; nor ſhall receive private Information, Meſſages, or Letters of Recommendation to draw them aſide from ſincerity, or to ſhew favour to any partie: but that they ſhall ſpeedily make known the ſame in open Court: By which means the Judges ſhall be leſs importuned by men of power, and ſhall keep their

An addition to the Judges Oath.

Conſciences clear, and unſpotted.

A means for the Judges to avoid importunitie, &c.

If the like Oath were given to the Maſters of the Chancery, who in ſome Caſes, and at ſome times, do ſit as Judges, and moſt commonly by their Reports do much guide and direct the Decrees in that Court; it might perchance avoid much imputation to themſelves and prejudice to others. But againſt this there is no doubt but there will be many Objections made.

Objections againſt giving th Oath to the Judges.

As firſt, That this Oath being new and ſo often taken would argue diſtruſt in the uprightneſs of the Judges, and that it will be a diſgrace not only unto them but to the Place wherein they ſit, and conſequently an imputation to the Juſtices of the Realm; that they ſhould not be truſted upon an Oath, (as Chriſtians ought to be in other Caſes.) And next, that it will be an impeachment of reputation to all former Judgments, and Judges, who were not tyed with ſo ſtrict a Band. And therefore if this were now neceſſary, then were they in former times let goe with too long raines of libertie and of looſeneſs.

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That which may be anſwered to theſe Objections is this: Firſt, That this new, more ſtrict and frequent Oath doth not ſo much argue diſtruſt in the Judges as put them in minde of their Duties; no more than the often calling of a Steward or other great Officer to a ſtrict and often Accompt doth preſuppoſe that his Faith is alwaies doubted; nay, it is the beſt means for his diſcharge (which moſt wiſe and honeſt men do much deſire:) and ſo in this Caſe it may be ſaid, that this Oath, thus taken, is the ſtrongeſt Argument that may be to free the Judges from ſuſpicion of Corruption (whereto they may many times be ſubject cauſleſly:) for what man of any charitable and reaſonable conſideration will conceive, but that he hat is more often and ſtrictly ſworn to doe his duty will be more carefull to diſcharge it, than he who but once in his life receiveth that Oath? And for ſome part of this Oath it is ſuch, that no Judges of this Land have been formerly ſworn unto, and yet it is ſuch as, by the opinion of ſome both wiſe

Anſw. to theſe Objections.

and learned, is held moſt neceſſary.

For the other Objections: That it will be a diſgrace to their Places, and to precedent Judges, and Judgments, that theſe are oftner and more ſtrictly ſworn than were former Judges. Divers do deem that neither of theſe conſequents will enſue. One reaſon is, That if this Oath be a diſgrace to precedent or to preſent Judges; then the like would enſue, That an Oath taken by a Biſhop of this Land (not long ſince) of his clearneſs from Simony, and from giving any thing for his Biſhoprick, would be a diſgrace to him or to his Predeceſſors, who had not taken the like Oath before. Yet I think no man will conclude ſo, but rather, that this is a worthie Precedent, fit to be followed and to be left unto poſterities. Alſo it may be ſaid, the more multiplicitie of Suits that doth increaſe (as indeed they doe dailie) the more caution is to be uſed, and the more care to be enjoyned unto the Judges in the Trial of them. Secondly, The former Judges followed the Oath which was given them, and therefore no diſgrace to

them

them that their Succeſſors have a more ſtrict Oath; nor is it any diſgrace to them that receive it: becauſe it belongs unto latter times, to provide for that which former Ages have left undone. And in this new Oath, no Judge is ſingled out, or made a mark by himſelf, which if he were, it might indeed tend much to his diſgrace, as a great argument of diſtruſt in him. But whether this Oath, or any part of it, and whether the latter, if not the former, be to be uſed, or whether it be often or ſeldom to be adminiſtred; is a matter which I ſubmit wholly to the Cenſure of ſuch as are moſt Judicial and ſit in the higheſt ſeats of Authority and Judgement.

To the ſecond Point, ſpoken of before, which concerneth the overburthening of the Subjects by delays and by diverting the right Proceedings of the Law. This is not to be attributed to the Laws themſelves nor to the Judges thereof, but to the corrupt miniſters, officers, and practitioners of the Law, who do (as moſt men in other Faculties are accuſtomed

cuſtomed) prefer their own private profit before the publick utility. They from whom theſe faults do flow (which are commonly but not juſtly imputed to the Laws) are, amongſt others, theſe; that is to ſay, Councellors at Law, Atturneys, Officers in Courts of Records, Sheriffs and their Bailiffes, &c.

For the firſt ſort, which are the Councellors at Law and Barriſters, as they are called, the right Proceedings of the Law (in divers particular mens Caſes) in Suits, is many times diverted, and ſometimes overthrown by their multitude, inſufficiency, advice of delatory, or defective Pleas, by their taking of exceſſive Fees, and by their abſenting of themſelves from the Barrs, and places appointed to plead for their Clients, after that they have taken Fees.

Multitude of Councellors.

Firſt, the multitude of Councellors at Law and outer Barriſters is ſo great, that many of them are not able to maintain themſelves, and ſome have few or no Clients at all, eſpecially ſuch of the ſecond ſort as were named to be inſufficient, who if

if any Suitors at Law come unto them for Counſel by reaſon of their acquaintance, kindred, or other private reſpects, they many times ſend them away unſatisfied, or if they rely on ſuch weak Councellors, ſometimes their good Cauſes (for want of ſound Counſel) are overthrown. The reaſon of the multitude and inſufficiency of many of theſe Councellors at Law (as I conceive it) is, becauſe divers of them are admitted to the Barr before they have read over half the Volumes of the Law, and before they have with any good Commendation or allowance, performed the exerciſes at Mootes, and at Readings, which is requiſite for the place, and for the teſtimony of their Profeſſion and ſufficiency: but having lived ſo long in one of the Inns of Court, as is preſcribed by the orders of that houſe wherein they are; although they be (and are known to be) no profitable or painfull ſtudents: yet, by favour they find meanes to be called to the Barr, many times to their own hindrance, and much to the hurt of ſuch

The Inſufficiency of divers Councellors at Law.

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as have their Counſell. The ſecond Cauſe of this their inſufficiency is, for that they have of late been permitted to plead at Barr, and to put their hands unto Pleadings, as ſoon as they are made Barriſters: whereas in former times it was neither uſual or allowed, that they ſhould either plead at Barr or put their hands to Pleadings till three years after they were called: and in thoſe times they were kept more hardly and ſtrictly to their Mootes and Pleadings in thoſe houſes wherein they continued. The Inconveniencie of this generall, untimely and promiſcuous kinde of Pleading and counſeling by all ſorts of Lawyers in *Rome* (aſwell the unlearned as the able and ſufficient) was foreſeen and in ſome ſort prevented by *Auguſtus* the Emperor in his time, who ordained that no Lawyer ſhould practiſe without his royal aſſent and approbation firſt had. If the King's Majeſtie did take this courſe with our Common Lawyers, or elſe aſſigned ſome others of greateſt authoritie and Judgement in the Law to take good

Auguſtus his reſtraint of Lawyers in Rome.

good notice and aſſurance of their ſufficiency before they ſhould be admitted to practiſe, there would not be ſuch a deluge of inſufficient Councellors at Law within this Kingdome, by whoſe Ignorance and want of knowledge many mens Inheritances and Eſtates are overthrown.

The ill advice of Councellors given to their clients.

For their perillous advice of delays, and of other evaſions to procure gain unto themſelves, and leſs unto others: it is ſure that there are divers Councellors at Law who ſtudy nothing more than (as it may be truly termed) the Gall of the Law; how to ſeek evaſions, and to defeat the true meaning of the Law, and aſwell to draw ſome into danger of the Law and to overthrow the Right of others by their own incircumſpection, by their Adverſaries cunning, and by the advices of ſuch wicked Councellors againſt whom there ſhould be ſome ſharp Law made for their puniſhment: or if not ſo, yet it ſhould ſeem requiſite that every Councellor at the Law, ſhould (when he is called to the barr) take ſome

An Oath neceſſary to be given unto Councellors at Law.

ſome ſpecial Oath for his upright dealing in the advice of his Clients; to proceed according to Equity, and that he ſhould not lead them into any by-paths of indirect and un-conſcionable evaſions, contrary to the true meaning and upright courſe of Law, and of a good Conſcience. By this means (if they who take this Oath have any good Conſcience in them) the expence of much money in Law may be ſaved, and honeſt peaceable men kept from the trouble of quarrelſome and unquiet Neighbors in Cauſleſs Suits.

The exceſſive Fees that Councellors take.

Another abuſe there is offered by the Councellors at Law in the taking of exceſſive Fees, which late Cuſtome their extream covetouſneſs, and the neceſſities of mens Eſtates in their Suites have introduced: For of late years (and in the memory of many men yet living) xx *s.* was a good Fee for a great Councellor, not onely to move but to plead at the Barr; and if a Serjeant at Law had x *s.* for to argue a Caſe, he thought himſelf well rewarded. But now what Councellor of account and of good practice

practice is there, that will think *xl s.* a ſufficient recompence if he do argue any mans Caſe at the Barr? nay that Serjeant at Law who hath but *v l.* given for ſuch a purpoſe, will goe thither with an ill-will, or elſe not come at all; beſides how often they muſt be feed in one Caſe, even in one Term, although of the pooreſt Client they have, (if they have occaſion to come often unto them) common experience, and many poor mens Purſes can too well tell. Therefore when it pleaſed the King's Majeſty at his firſt coming to this Crown of *England* graciouſly to take notice of this enormity, and to make known his Pleaſure that indifferent and reaſonable Fees ſhould be taken by the Councellors at Law of their Clients, ſome of them did reſtore (or at leaſt offer to reſtore) part of the Fees profered unto them, which continued no longer with any of them than the dread of puniſhment or of danger drew them thereto. But where it is alledged by ſome, that the ſufficiency of all Councellors is not alike, nor their pains and travell all alike, and

Many Fees every Term for one Cauſe.

All Lawyers not of like ſufficiency or merit.

and therefore their Recompence cannot be equally meaſured, no more than in other Faculties can the profeſſors thereof merit as much the one as the other.

To this I think it may be eaſily anſwered, That although the ſufficiency and pains of every one be not anſwerable unto the beſt, yet there ſhould ſome proportion be limited, what the beſt might deſerve, and how much he ſhould take in ſuch and ſuch particular Caſes; by which alſo ſomewhat a correſpondent Recompence might be awarded to others of inferior degrees and ſufficiency, though not to be ſcanted by the penny yet at the leaſt to be rated by the pound, whereby a man of reaſonable Eſtate (in a ſuite of reaſonable value) might compaſs his Right without his undoing: and although the Labourer be worthy of his hire, yet is it hard, that the Labourer for his hire ſhould have the value of the Land whereon he laboureth or more, as many Lawyers have.

Some proportion of Fees to be limited.

But chiefly divers of the Councellors do offend and abuſe their Clients

Clients (ſometimes to their utter undoing) when ſome of them do take round Fees againſt a day of Hearing, and yet neither come to the place, or if they do they depart before it be heard, and ſometimes in the midſt of the Argument being ſent for unto another Barr in another Cauſe, where perchance their Fee is greater or their Client of more reputation or nearer unto them, whereby men depending on them according to promiſe after Fees taken, receive much prejudice, and ſometimes the ſubverſion of their Eſtates. In this Caſe many men have much wiſhed that either they were enjoyned to plead at one Barr only, (according to antient order, ſo ſhould they be certainly found, and their Clients not fruſtrated of their help) or elſe if that were not thought fit, yet that ſome ſevere puniſhment may be ordained and afflicted on ſuch Councellors as take Fees for ſeveral Courts in one day, and do break with their Clients.

The 2d ſort of Miniſters towards the Law, who do miſlead the people in their Suits, and ſometimes make

The Abuſe of Attornies.

them miſſpend their money in undertaking of unjuſt Suits, and ſetting on of men to cauſeleſs quarrels, (for their own private commodity,) are the Attorneys at Law, who do divers ways offend, and many of them offer much wrong. Firſt, for their Multitude; for they have increaſed to ſuch a huge number of later years, that they cannot chuſe but make much work for the Lawyers and Law in the parts wherein they live; as in the Courts of Records at Weſtminſter. Firſt, to begin with the Court of Common-pleas; Since this Chief Juſtice of that Court came to his Place, he commanding an Enquiry to be made by Jury, of the number and condition of Attornies belonging to that Court; it is ſaid that there were no leſs than 800. of them found already by Jury: ſo that the Complaint is common, that every Scrivener, and other mens Clerks, who have deſired that place, (paying a certain ſum,) have been all thereto admitted, to the no ſmall hurt of the Subjects of this Kingdom. But if the Lord chief Juſtice, who hath begun this

The Multitude of Attornies.

Attornies of the Common-pleas.

this laudable courſe, do perfect it, without remiſſion, to weed out both the exceſſive ſurpluſage of their number, and diſcharge all them that are ill conditioned, or not of ſufficient underſtanding and experience, (as no doubt but that there are divers of that ſort,) and no queſtion but he will doe it,(eſpecially if he be required thereto:) By this good example, other Courts of Juſtice may be purged of their ill members, to the generall good of the whole Realm.

There is the like, though not ſo great an exceſſe of Attornies, in the Kings Bench at Weſtminſter, wherein there are eſtimated to be about 200,and yet within the memory of ſome yet living, there were not above eight or twelve at the moſt; for indeed they ought not to be other than the Prignatories Clerks of that Court. But beſides theſe (who only make out Writts) there are nine parts of ten that are reckoned Attornies at large, as they call them, who neither take Oath, nor have any power to make out Writts, but yet every one of them keeps a Clerk,

Attornies in the Kings bench.

Attornies at large.

and ſome two, to write under them, who muſt be maintained by their Maſters countenance, and ſometimes they maintain their Maſters, by bringing Cauſes, and Clients unto them: theſe ſwarming in ſo great numbers, cannot live, and grow rich (as many of them do) without they hearten and increaſe Suits and ſtirs betwixt their neighbours, which enormities might partly be reformed by the Statutes already made, if they were put in execution and by ſome other proviſion; for it ſhould ſeem that former times have had trial of their abuſes, and care to reform them, though there were not then ſuch urgent cauſe to take a ſharp courſe with them as at this inſtant.

Proviſion made by former Laws againſt Attornies.

By the Statute of the 4 of *Henry* the 4. every Attornie ſhould be ſworn truly to ſerve in their Offices, but now no Oath at all given unto many of them, eſpecially to deal juſtly and uprightly, other than for the profit of their Court. By the ſame ſtatute, if any Attornie were openly found in default, by Record or otherwiſe, he ſhould forſwear the Court, and

and never after be allowed to proſecute any Suite in any of the King's Courts.

By a late Statute made 3 *Jacobi nuper Regis Angliæ* none ſhould be henceforth admitted Attornies in any of the King's Courts of Record, but ſuch as have been brought up in the ſame Courts, or have been well practiſed in ſoliciting of Cauſes, and have been found of honeſt diſpoſition; which Statute (ſo well and lately made) is already ſet aſide, and grown out of uſe.

By the ſame Statute no Attornie ſhall be allowed from his Client for any Fee or for any Disburſement in charge of Law without a ticket ſubſcribed with the hands of them to whom the ſame is given or paid, and ſhall give a bill, ſubſcribed with his hand, of all ſuch Charges concerning the ſaid Suits. But yet we ſee this Law no ſooner made, but already altogether infringed by the Attornies and Solicitors: for it may be, that ſome of them do deliver a Bill of the Charges, but who is there that bringeth a Ticket under the hands of

the Councellors and Officers to whom the ſame is paid? This is an abuſe worthy to be reformed, and this Statute very neceſſary to be executed.

In the 33 year of King *Henry* the 6. a Law was made that there ſhould be but ſix common Attornies in *Norffolk*, ſix in *Suffolk*, and two in *Norwich*. If then the Country were peſtered with Attornies, and that a Law muſt be made to aſcertain the number (which likewiſe ſhould be elected and admitted by the two chief Juſtices,) how much more needfull is it now to have the like Law of reſtraint for all the Counties of this Kingdom, when we ſee how, even in thoſe Shires (then thus provided for) there are far greater numbers of Attornies, and ſuch for the moſt part as they are ſpecially noted (by them who know theſe Countries) to be full of cunning, and many of them nouriſhers of contention, and contenders themſelves with their neighbours. Theſe being commonly the Conduits that convey Suits and Gain to covetous and unconſcionable

A Law already made neceſſary to be executed for the admiſſion of Attornies.

conſcionable men deſiring Law, with the loſſe and impoveriſhment of many: there is therefore great need that their numbers ſhould be leſſened, and their diſpoſitions, who ſhall be allowed to practiſe, well known to be good and honeſt.

A third ſort there are of the miniſters of our Law which do offer oppreſſion and wrong unto the ſubjects of this Kingdom in their Suits. And they are the Officers of the Courts of Records and their Clerks, whereof many do exact unreaſonable and unlimited Fees, not (or very ſeldome) vouchſafing to ſetdown in a note under their hands what their Fees are, but demanding ſo much, or elſe nothing muſt be done, or if it be firſt done they will often detain it untill their own demands be ſatisfied. So the Subject muſt give whatſoever it pleaſeth them to ask. Wherein it hath been the hearty deſire of ſuch as wiſh well unto their Country (without any private reſpect unto themſelves) that there might be a certainty of Fees ſet down for every Court, and the ſame to remain in

Abuſe of Officers and their Clerks in the Courts of Record.

No certainty of Fees in moſt Courts

written Tables in open Court, ſubject to every mans view, whereby the Subjects who have Suits in Law may not have ſo great cauſe of loſs, and of complaint as now they have.

Excelſive Rates for the writing of Copies.

Of the ſame nature (and indeed a part of this exaction) is the excelſive Rates taken for writing the Copies of all Bills, and Anſwers, Replications, and Rejoinders, and of all other Records within the Court of Weſtminſter and the Offices belonging to the ſame: Firſt for the foule and waſtfull Writing, next for the few numbers of Lines in every Sheet, and for the ſmallneſs of the Paper wherein they write; they alwayes demanding ſo much for the ſheet, how few ſoever of lines, letters or ſyllables there be in the ſame; and allwayes they ſtrive to write the leaſt they can, with great letters, full of large daſhes, to make the more diſtance, and very ſpacious lines for their more Gain and the greater Charge of them who are forced to take out theſe Copies, whereby they raiſe great ſummes of mony out of the Subjects purſes, keep good houſes, purchaſe

Waſtfull Writing of purpoſe.

purchaſe much living, enrich themſelves and impoveriſh many Sutors at Law. If that ſome reaſonable ſtint of this Writing and the certainty of Fees withall might be ſet down and obſerved, it would without doubt yield great contentment, profit and eaſe unto the people of this Land, who, for the moſt part, feel, and ſome ſink under this burden.

Beſides theſe before mentioned Abuſes in the Miniſters and Officers of our Law, there are ſome other declinations and with-drawings from the right Proceeding of Law by ſuch as ſeek to pervert the ſame. As firſt in every Court of Record in Weſtminſter, the Judges have certain ſelected men, on whom they are pleaſed to beſtow their favours, in yielding them ready hearing before others; which being perceived, they are the more reſorted to (and muſt have the more Fees.) This increaſeth the charge of the ſubjects, and yet many times diſappointeth them of their expectation. And although it be not unreaſonable that the Judge ſhould extend his favour more unto ſome

The Judges ſelect certain Lawyers, whom they hear moſt willingly and often.

ſome than unto the reſt (by hearing them before others) yet conſidering the inconveniency of this favour, it were far better forborn, and to be ſome way elſe ſhewed unto them that deſerve it. There is alſo ſome defect in the Courts, concerning the Rules of the Courts, that ſometimes the Judges themſelves are ignorant of the Rules of their Courts, touching the times of Anſwer, Reply, Rejoynder, Imparlance, with the like circumſtances, whereby they are forced to ask the opinions of the antienteſt and beſt experienced Attornies and Officers of the Court, touching thoſe Rules; where it were much better that time were taken by the Judges to examine theſe Rules, wherein perchance ſomewhat might be amended for the more ſpeedy execution of Juſtice, and the ſame ſet down in writing might be more certain and ſubject to all mens knowledge, with leſſe hindrance to Suitors and to their Cauſes.

Rules of the Courts uncertain and unknown to the Judges.

There are alſo ſome Courts in Weſtminſter, where the Judges (as for example the Barons of the Exchequer)

chequer) do alter upon new motions out of Court (as in the Chequer Chamber or in other places) the Orders made in Court. And that which was publickly ordered by all the Barons in open Court is often reverſed by one of the Barons; when either the plaintiff or defendant bringeth his Counſel, and upon ſome new information, getteth the former Order to be diſſolved, which tendeth much to the Trouble, Charge and Delay of many Suitors.

Alteration of Orders out of the Court.

In the Kings Bench and ſomewhere elſe (as it is ſaid) writing out of Record muſt be twice or thrice unneceſſarily copied, as upon a Prohibition a copie of the Suggeſtion, then after Declaration, a new Copy, after iſſue or Demurrer, a third Copy; whereas each of them ſometimes coſt three, four or five pounds; and yet, with a little alteration, it is thought that one might ſerve for all.

Unneceſſary Copies to be taken out.

The incertainty and intricate ambiguity of Pleadings in the Courts of Records bring much dammage and danger unto the Subjects of this Kingdom,

Incertainty and intricacy of Pleadings.

Kingdom, wherein many men (wiſhing well unto our Laws) have exceedingly deſired, That either ſome certain Formes of theſe Pleadings (if it were poſſible to be performed) might be drawn by expert men, and the ſame conſidered and corrected by the Judges, might ſtand for good: and thoſe Forms to be allowed as in *Rome*, at the firſt, the Forms of Actions were given to the Actors of the Law by the Pretors:

Advantages of pleadings not to be ſo penal.

Or if this may not be performed, yet that ſome other Courſe were taken upon the advantage of a Pleading miſtaken than is in the Caſe betwixt the King and his Subject.

A ſhorter courſe to be taken in Actions perſonal.

If alſo in Actions perſonal a ſhorter and more certain Courſe were taken than is by our Common-law, whereof ſomewhat hath been ſpoken before (as that which the Civil Law alloweth, or ſome other ſuch like) for ſpeedy and direct Trial without evaſion or circumvention; it would yield no ſmall profit unto the People that are forced to proſecute theſe Suits.

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